Supreme Court, U.S.
FILED

011792 JUN 3 2001

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No. 01-

IN THE

Supreme Court of the United States

FRANK ANTICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DOES CONVICTION OF A NON-FEDERAL PUBLIC OFFICIAL FOR EXTORTION UNDER COLOR OF OFFICIAL RIGHT REQUIRE THE GOVERNMENT TO PROVE INDUCEMENT BY THE PUBLIC OFFICIAL RECEIVING BENEFIT UNDER COLOR OF OFFICE, OR AT A MINIMUM A SHARED UNDERSTANDING OF *QUID PRO QUO* BETWEEN THE PUBLIC OFFICIAL RECEIVING BENEFIT AND THE PAYOR OF BENEFIT?

2. DOES CONVICTION OF A PUBLIC OFFICIAL FOR MAIL/WIRE FRAUD IN DEPRIVING CITIZENS OF THEIR INTANGIBLE RIGHT TO HONEST SERVICES BY FAILING TO DISCLOSE A FINANCIAL INTEREST IN THE BUSINESS OF SOMEONE WHO PERFORMS FUNCTIONS BEFORE THE PUBLIC OFFICIAL REQUIRE AS A CONDITION PRECEDENT OF MATERIALITY THAT THE PUBLIC OFFICIAL DO MORE THAN SIMPLY FAIL TO DISCLOSE ANY CONFLICT OF INTEREST?

3. IS IT INAPPROPRIATE TO SENTENCE A PUBLIC OFFICIAL CONVICTED OF MAIL/WIRE FRAUD FOR DEPRIVING CITIZENS OF THEIR INTANGIBLE RIGHT TO HIS HONEST SERVICES BY FAILING TO DISCLOSE A FINANCIAL INTEREST IN THE BUSINESS OF AN INDIVIDUAL WHO PERFORMS FUNCTIONS BEFORE THE AGENCY FOR WHOM THE PUBLIC OFFICIAL WORKS BY REFERENCE TO THAT INDIVIDUAL'S GAIN FROM SERVICES PROVIDED WHEN THOSE SERVICES WERE LEGITIMATE, APPROPRIATE AND USEFUL?

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Appendix B — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated January 12, 2002 ..... 59a

Petitioner, Frank Antico, respectfully requests a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in this case on November 28, 2001 with rehearing being denied on January 17, 2002.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) and is found in the Appendix (App. A). The judgment of the United States Court of Appeals for the Third Circuit entered on November 28, 2001 is found in the Appendix. (App. A). The Order of the United States Court of Appeals for the Third Circuit denying rehearing dated January 17, 2002 is found in the Appendix. (App. B).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

This case originally commenced by indictment in the United States District Court for the Eastern District of Pennsylvania. On May 11, 1999, after a jury trial, Petitioner was convicted. On or about April 28, 2000, the district court sentenced Petitioner to 63 months imprisonment. Petitioner sought review of his conviction and sentence before the United States Court of Appeals. By Opinion dated November 28, 2001, the Court of Appeals affirmed Petitioner's conviction but remanded the case for resentencing. (App. A). It is from that judgment that Petitioner requested a writ of certiorari be issued. On April 8, 2002 Justice Suter granted an extension of time to file this petition to June 1, 2002.

STATUTORY PROVISIONS INVOLVED

In relevant part, the United States Code provides:

> Whoever, in any way or degree, obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by . . . extortion or attempts or conspires to do so . . . shall be fined under

> this title or imprisoned not more than 20 years or both.

18 U.S.C. § 1951(a).

> The term extortion means the obtaining of property from another, with his consent . . . under color of official right.

18 U.S.C. § 1951(b)(2).

> Whoever, having devised or intending to devise a scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so . . . [uses the mails] . . . shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 1341.

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing the scheme or artifice, shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 1343.

> For the purpose of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible rights of honest services.

18 U.S.C. § 1346.

In relevant part, the United States Sentencing Guidelines provide as follows:

> If the loss to the government, or the value of anything obtained by a public official or others acting with a public official, whichever is greater, exceeded $2000,

> increase [offense level] by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

U.S.S.G. § 2C1.7(b)(1)(A).

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Courts Below

On September 30, 1998, a federal grand jury sitting in the Eastern District of Pennsylvania returned a nineteen count superseding indictment charging Petitioner with racketeering in violation of 18 U.S.C. § 1962(c) (Count 1); Hobbs Act extortion in violation of 18 U.S.C. § 1951 (Counts 2 through 10); wire fraud in violation of 18 U.S.C. § 1343 (Counts 11 through 18); and criminal forfeiture pursuant to 18 U.S.C. § 1963 (Count 19). At all times relevant to this case, Petitioner was a public official employed in various capacities at the Philadelphia Department of Licenses & Inspections in Philadelphia, Pennsylvania.

The racketeering violation (Count 1), included as racketeering acts a series of extortions (some, but not all of which were charged as substantive counts Counts 2 through 10) as well as a series of mail and wire fraud violations (some, but not all of which were also charged as substantive counts Counts 11 through 16).[1] The extortion charges (both racketeering acts and substantive counts) were charged under the theory of extortion under color of right. The mail and wire fraud racketeering acts and substantive counts (excluding Counts 17 and 18)[2] where charged under the theory that Petitioner deprived the citizens of Philadelphia of their rights to his honest services.

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1. Count 1 alleged several extortion and fraud (mail and wire) racketeering acts in addition to those charged as substantive counts. Acts alleged in Count 1 as racketeering acts but not as separate substantive counts occurred beyond the applicable statute of limitations and hence could not be charged separately.

2. Counts 17 and 18 charged wire fraud violations, which took place after Petitioner retired from the City of Philadelphia. These were not charged as racketeering acts in Count 1. Ultimately, the Third Circuit reversed Petitioner's conviction on Counts 17 and 18.

Following disposition of pretrial motions, Petitioner stood trial before a jury sitting in the United States District Court for the Eastern District of Pennsylvania. On May 11, 1999, the petit jury convicted Petitioner of all charges laid in the indictment.[3]

On April 28, 2000, the district court sentenced Petitioner to 63 months in prison on Counts 1 through 10 (racketeering and extortion), such terms to run concurrently. In addition, the district court imposed terms of 60 months of imprisonment on Counts 11 through 18 (wire fraud), such terms to run concurrently with each other and with the sentence imposed on Counts 1 through 10. Finally, the district court imposed a three year supervised release term and a fine of $10,000 and statutory special assessments.

Thereafter, Petitioner sought review of his conviction and sentence in the United States Court of Appeals for the Third Circuit. On or about November 28, 2001, the Third Circuit Court of Appeals issued its Judgment and Opinion affirming Petitioner's conviction on Counts 1 through 16; reversing his conviction on Counts 17 and 18 and directing that Petitioner be resentenced on all counts. The Third Circuit's Opinion and Judgment are attached. (App. A).

Petitioner timely filed a petition for rehearing with the Third Circuit Court of Appeals. On January 17, 2002, the Third Circuit Court of Appeals denied Petitioner's request for rehearing. (App. B).

Petitioner then filed an application under Supreme Court Rule 13(5) requesting an extension of the time in which to petition this Court for a writ of certiorari, which was extended to June 1, 2002. Since June 1, 2002 is a Saturday, the actual filing deadline is June 3, 2002. *See* Supreme Court Rule 30(1).

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3. The jury did find one racketeering act – one not charged as a substantive count – unproven.

B. Statement of the Facts

1. Extortion Racketeering Acts/Substantive Counts (Question 1)[4]

At all times relevant to this case, Petitioner was employed in various positions in the Department of Licenses & Inspections ("L & I") of the City of Philadelphia. L & I's function is to administer and enforce Philadelphia's code requirements including building, electrical, fire, business and zoning regulations. In large part, Petitioner was responsible for enforcement of L & I's rules and regulations directed to Philadelphia businesses, including bars and cabarets.

The gravamen of respondent's extortion claims/proofs was that Petitioner abused his public office through engaging in Hobbs Act extortion on multiple occasions by either receiving things of value for himself or for others under color of his office. Respondent's evidence tracked incidents and episodes that made up part of the charged pattern of racketeering activity.

In every instance of alleged Hobbs Act extortion, Respondent claimed and ostensibly proved that Petitioner either received something or attempted to receive something for himself or for some other person. In some instances, the payor or provider of benefit received something in exchange for the payment. In others, the payments were made purely because of Petitioner's position with L & I. In no instance of extortion, however, did Respondent prove (or even allege) that Petitioner induced the payor to make any payment or provide any benefit to Petitioner. Two examples of Respondent's proofs highlight this distinction.[5]

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4. A detailed statement of the facts underlying all the extortion charges is contained in the Third Circuit's Opinion. (App. A at 4a-12a).

5. As stated above, the evidence involved a series of at least 16 extortions. The facts concerning all the extortion charges/racketeering acts are set forth in the Court of Appeals Opinion. *See* note 4, *supra*.

Barbara Williams Episode – Racketeering Act 16[6]

Barbara Williams worked as an expediter, *i.e.*, a private entrepreneur, who, for a fee, would assist people with matters pending before L & I. On numerous occasions between 1985 and 1989, Ms. Williams paid Petitioner amounts totaling approximately $5,000 because of his position in the zoning unit at L & I. Sometimes she needed permit applications processed immediately by L & I. At the time, L & I operated on a first come, first served basis in processing applications for zoning or use registration permits. Ms. Williams was able to circumvent this policy by paying Petitioner. In this instance, the indictment seems to allege, and Respondent seems to have proven *quid pro quo*, but certainly not inducement.

Teazers Episode – Racketeering Act 12/Count 9

Thomas Kileen was the owner of Teazers, an adult club located in Philadelphia. On September 23, 1993, Petitioner and other L & I officials closed Teazers down because the dancers were in violation of local law and restrictions. After Teazers reopened, Kileen noticed Petitioner in the club on a number of occasions. He spoke with Petitioner and began to socialize with him. Kileen began to give Petitioner free drinks. In addition, Kileen gave Petitioner baseball tickets and on one occasion, the use of a limousine. Respondent presented no evidence to suggest that Petitioner did anything for Kileen in exchange for the receipt of these benefits. Kileen gave Petitioner free drinks and Phillies tickets and allowed him the use of the limousine solely because of his position. In this instance, clearly, Petitioner did not perform anything in exchange for the benefit received – hence, no *quid pro quo*. Again, no inducement was proven.

When the case was submitted to the jury, the district court did not instruct the jury that it was required to determine whether Petitioner induced his extortion victims into giving him gifts

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6. Petitioner was charged with only nine substantive extortion counts (Counts 2 through 10). As part of the racketeering charge, however, the government alleged 16 separate racketeering acts. *See* note 1, and accompanying text *supra*.

and favors with a promise or threat of an official act in return, or at a minimum that a *quid pro quo* was required to be understood between Petitioner and the payor. The Third Circuit Court of Appeals found the district court's refusal in this regard to be appropriate. *See* App. A at 18a-30a.

2. Mail and Wire Fraud Racketeering Acts and Counts (Question 2)[7]

During his employment with L & I, Petitioner became romantically involved with Elizabeth Ricciardi. In the 1980's, Ricciardi had two children by Petitioner. Initially, Petitioner failed to make child support payments forcing Ricciardi to file a child support petition in the Philadelphia Court System. Petitioner then volunteered to pay child support if Ricciardi withdrew the petition. At some point thereafter, in lieu of future child support payments, Petitioner offered to assist Ricciardi in setting up an expediting business. Petitioner assisted Ricciardi by helping her complete forms and teaching her what she needed to know in order to become an efficient expediter.

Petitioner and Ricciardi understood that in exchange for Petitioner's assistance in her expediting business, Ricciardi would forgive Petitioner's then existing and future child support obligation.[8] Thereafter, Ricciardi began and pursued a fairly lucrative career as an expediter. In fact, over an approximate seven year period ending in 1995, Ricciardi earned gross receipts from her expediting business in excess of $700,000.

Although everyone with whom Petitioner worked, including his supervisors, knew of his personal relationship with Ricciardi, Petitioner was charged with and convicted of mail and wire fraud on the theory that he had an undisclosed financial relationship with Ricciardi and therefore (through non-

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7. A detailed statement of the fact underlying the mail and wire fraud charges is set forth in the Court of Appeals Opinion. App. A at 13a -15a.

8. The record established the value of forgiven child support to be approximately $32,000. App. A at 37a.

disclosure) deprived the citizens of Philadelphia of their intangible right to his honest services.[9]

In connection with this aspect of the case (mail and wire fraud relating to Ricciardi), Petitioner argued both insufficiency of evidence and improper jury instruction on the materiality element of the offense(s). Specifically, Petitioner argued that his undisclosed financial interest in Ricciardi's expediting business terminated once she earned more than the forgiven child support debt ($32,000). Since under the evidence, Ricciardi earned this amount of money very early in her expediting career, any disclosure failure by Petitioner was not material to the fraud charges laid in the indictment and submitted to the jury.

3. Sentencing Related Facts (Question 3)[10]

The district court sentenced Petitioner to 63 months on the RICO count (Count 1) and the extortion counts (Counts 2-10). In addition, the district court imposed a 60 month sentence on the fraud related counts (Count 11-18).

In calculating the sentencing guidelines on the fraud counts, the district court applied U.S.S.G. § 2C1.7 as the section most appropriate for fraud cases involving the deprivation of faithful and loyal services. In applying U.S.S.G. § 2C1.7, the district court enhanced the guidelines by reference to the in excess of $7000,000 gross receipts earned by Ms. Ricciardi. Petitioner argued that the proper measure of loss for purposes of U.S.S.G. § 2C1.7 was the $32,000 child support obligation which Ricciardi forgave in exchange for Petitioner's assistance in setting up the expediting business. The Third Circuit Court of Appeals affirmed the district court's conclusion on this point. *See* discussion at App. A at 30a-44a.

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9. Noteworthy is the absence of allegations or proof that Petitioner ever approved any application or permit request for Ricciardi (or her clients) that should not have been approved.

10. A detailed discussion of the facts relevant to this issue is set forth in the Court of Appeals Opinion. (App. A at 13a-15a).

REASONS FOR GRANTING THE WRIT

A. The court below – in conflict with other judicial circuits and at least three members of this Court – incorrectly held that prosecution of a non-federal public official for color of office extortion does not require the government to prove inducement by the public official receiving benefit under color of office, or at a minimum, a shared understanding of *quid pro quo* between the public official receiving benefit and the payor of benefit.

Below, Petitioner argued that color of office extortion requires the government to prove inducement by a public official receiving benefit under color of office, or at the very least an understanding of *quid pro quo* between the public official receiving benefit and the payor of benefit.[11] The district court refused to instruct the jury on these points.

In Petitioner's view, the conviction for color of office Hobbs Act Extortion requires both proof of inducement and *quid pro quo*. Judicial authority on this point can be traced to this Court's opinions in *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991) and *Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992).

In *McCormick*, this Court concluded that proof of specific *quid pro quo* is a necessary element of color of office extortion, at least when the prosecution is based exclusively on payments identified as campaign contributions. Noting the special place of campaign contributions in our system of government, Justice White pointed out that cases of fear, intimidation and violence were still covered by the Hobbs Act as were color of office campaign contributions but only if:

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11. Petitioner does not argue that color of office extortion under 18 U.S.C. § 1951 requires a specific agreement such as: in exchange for a payment, a public official agrees to do a very specific thing. Petitioner argues only that there must be some understanding between the payor and the public official that the payment is made in exchange for some action or inaction at some point. The key, however, is the existence of an understanding of *quid pro quo*.

> [T]he payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

Id. 500 U.S. at 273, 111 S. Ct. at 1816.

One year later, this Court decided *Evans*. The point came up again, but in a campaign and non-campaign setting. *Evans* involved the case of a local official who took, in an FBI sting dealing with re-zoning a particular tract, the sum of $7,000 in currency and $1,000 by check payable to an election campaign fund. The check was reported by the recipient, the currency was not. The official claimed he had not promised to do anything in return for cash. The trial court, however, instructed that passive receipt was enough if the official knows his office was the motivating factor and the payment is for a specific requested exercise of official power. The trial court in *Evans* instructed the jury as follows:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, and a demand or acceptance does constitute [color of office extortion].

United States v. Evans, 504 U.S. at 258, 112 S. Ct. at 1884.

Justice Stevens, writing for the court, found that the above instruction satisfied the *McCormick* requirement of *quid pro quo*, apparently referring to the campaign contribution check, "because the offense is completed when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense". *Id.*, 504 U.S. at 268, 112 S. Ct. at 1889.

Speaking more broadly, Justice Stevens then said:

> We hold today that the Government need only show that a public official has obtained a payment to which

> he was not entitled, knowing that the payment was made in return for official acts.

Id. 504 U.S. at 268, 112 S. Ct. at 1889. (Emphasis added.)

Justice Kennedy concurring, and referring to the above language in particular, stated the language was critical to Hobbs Act jurisprudence and conclude the dissent was likewise of the view that *quid pro quo* is an element in all Hobbs Act color of right cases. Justice Kennedy stated: -

> Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all section 1951. That is as it should be, for, given a corrupt motive, the *quid pro quo,* as I have said, is the essence of the offense.

Id. 504 U.S. at 278, 112 S. Ct. at 1894.

This Court's dissenters (the Chief Justice and Justices Thomas and Scalia) believe that without "inducement" there can be no extortion.[12] They appear to have accepted *quid pro quo* as an element although a "made up" one, designed to avoid the more rigorous inducement requirement. *Id.* 504 U.S. at 285, 112 S. Ct. at 1898.

In light of the above, it is clear that a significant number of the current members of this Court are of the view that *some form of quid pro quo* is needed and the minimum formulation is that there be an understanding that the payment is "in return for official acts". Additionally, at least three and possible four members of this Court would require inducement.

Examination of the charge in the present case clearly establishes that the trial court did not comply with this Court's minimal formulation of *Evans' quid pro quo* thereby necessitating a new trial without much further discussion. As is

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12. Additionally, given that Justice O'Connor specifically refused to consider whether the statute requires inducement by the public official, *Id.* 504 U.S. at 271, 112 S. Ct. at 1891, it is possible that at least four members of this Court believe inducement to be required.

set forth in the Third Circuit's Opinion (*see* App. A at 26a-27a), in this case, the district court charged the jury as follows:

> Extortion under color of official right is the use of one's position as a public official or the authority of public office to obtain money or services not due the official or his public office. Such extortion violates the Hobbs Act . . . If you decide that the defendant was given money or goods or services not due the office he represents then you must decide whether the defendant used the authority of his office or position to obtain the money, goods or services. The third element is wrongful obtained consent of the giver. The government must prove beyond a reasonable doubt that these items were given to the defendant in connection with his power and authority as a public official. The giver may have initiated the exchange and the parties may be on friendly terms. These are factors to be considered in deciding whether the giver gave the payments, goods or services because he believed the defendant would use his office of acts not properly related to his official duty or whether instead the giver was making a voluntary contribution.
>
> Unless you believe beyond a reasonable doubt that the defendant knew the giver's consent was wrongfully obtained, that is, that the money, goods or services were given in connection with the defendant's misuse of his official position rather than being given voluntary you cannot convict the defendant.

As the Court of Appeals noted, no specific instruction to find an express *quid pro quo* was given. In fact, the words *quid pro quo* are nowhere mentioned. Nor did the district court specifically negate such a requirement as did the trial court in *McCormick*. The instruction given by the district court in this case is a completely watered down and misleading version of *quid pro quo* required under the *McCormick-Evans* line of cases.

Ironically, the Third Circuit court of Appeals itself seems to require a greater showing of *quid pro quo* requirement than that presented and approved in this case. In *United States v. Bradley*, 173 F.3d 225 (3d Cir. 1991) the court held in a non-campaign case that an "express agreement" need not be proved [Petitioner makes no such claim in his *Evans* claim] but there must nonetheless be a *quid pro quo*. The court stated the following:

> [Extortion under color right] is completed at the time when the public official knowingly *accepts the benefit in return for his agreement to perform or not perform an act related to his office.*

173 F.3d at 23. (Emphasis added). This statement of the law cannot be reconciled with the Court of Appeals decision in this case.

Additionally, the decision below starkly conflicts with statements of the law on this point articulated by other circuits. For example, in a case decided after the instant case was submitted to the Third Circuit, the Seventh Circuit Court of Appeals held that:

> *Evans*, which although not entirely clear, can easily be read to lend support to an inference that the *quid pro quo* requirement applies in all extortion prosecutions under the Hobbs Act . . . We therefore join the circuits that require a *quid pro quo* showing in all cases.

United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2000). In reaching this conclusion, the Seventh Circuit noted that the requirements for conviction under 18 U.S.C. § 1951 in a non-campaign color of right case is somewhat confusing, especially given the different views espoused by members of this Court – including the strong view expressed by the dissent that *quid pro quo* in fact equals inducement.

As stated above, this Court should grant Petitioner's writ of certiorari simply because the circuit courts are in conflict on this issue. *See* Supreme Court Rule 10. Clearly, the Third

Circuit's opinion in the instant case cannot be reconciled with *Giles*. Additionally, the Second Circuit Court of Appeals in *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000) seems to apply another "watered down" *quid pro quo* requirement. That court in *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000) requires some proof of *quid pro quo*, although a somewhat watered down version. Specifically, in *Middlemiss*, the Second Circuit articulated the standard as follows:

> The government need only show that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts and proof of an explicit promise to perform the official acts in return for the payment is not required.*

Id. 217 at 117 (emphasis added) (citations omitted).

Clearly, the Seventh Circuit in *United States v. Giles*, 246 F.3d 966 (7th Cir. 2000), as well as the Ninth Circuit, *see United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998) require a specific understanding of *quid pro quo* in exchange for benefit. The Second Circuit requires just some understanding that the payment was made in return for official acts. The Third Circuit's view as articulated in the present case (as opposed to its prior decision in *Bradley*) requires no understanding that payment being made is for some official act. Certainly, the Third Circuit does not require a specific *quid pro quo* as does the Seventh Circuit and as is required under this Court's *McCormick* and *Evans* cases.

For these reasons alone, the writ of certiorari should issue. Nonetheless, there are also other reasons for this Court to issue the writ of certiorari. For example, the line of cases discussed above must now be examined in light of this Court's decision in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 119 S. Ct. 1402 (1999).

Shortly before this case was submitted to the jury, this Court decided *Sun-Diamond Growers*. That case arose under the federal anti-gratuity statute, 18 U.S.C. § 201, and in a startling

way rejected years of consistent circuit court precedent. In *Sun-Diamond Growers*, this Court held that for a federal official to violate § 201 more was needed than a general understanding that the payment was given in connection with the office, or for general good will. Instead, there had to be a specific tie in between the payment and some specific official act.

In this case, both before the district court and the court of appeals, Petitioner argued that this Court's holding in *Sun-Diamond Growers* is illustrative of how courts must interpret 18 U.S.C. § 1951 color of right cases – especially when the evidence suggests nothing more than payment of a gratuity to a local official. The courts below dismissed this argument suggesting that *Sun-Diamond Growers* is nothing more than a statutory interpretation case. The lower courts' attempts to relegate *Sun-Diamond Growers* to a mere statutory interpretation case miss the forest for the trees in several respects.

First, the statutory formulation in 18 U.S.C. § 201(c)(1)(A), the gratuity statute, prohibits the giving of anything of value "for or because of any official act", language that for many years had been read by the circuits as not requiring a *quid pro quo*. This language is virtually identical to Justice Stevens' formulation of Hobbs Act extortion in color of official right cases in *Evans*. It seems highly unlikely this Court would give separate meanings to virtually identical formulations, even if one is statutory and the other case law. In truth, this Court's opinion in *Sun-Diamond Growers* sounds the death knell for any sort of stingy *quid pro quo* instructions in Hobbs Act cases since it makes no sense to bless different interpretations of virtually identical sets of words where those words described prohibited activity for similarly situated potential defendants – public officials.

Second, principles of federalism balk at the idea that local public officials can be prosecuted under the Hobbs Act on a less stringent standard than applicable to their federal counterparts. In his dissent in *Evans*, Justice Thomas states:

> The Court's construction of the Hobbs Act is repugnant not only to the basic tenets of criminal justice reflected in the rule of lenity, but also to basic tenets of federalism. Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws — acts of public corruption by state and local officials . . . [Mr. Justice Thomas discusses *United States v. Kenny*, 462 F.2d 1205, *progenitor* of the Hobbs Act "stunning expansion"] . . *Kenny* obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both.
>
> > "As effectively as if there were federal common law crimes, the court in *Kenny* . . . amend[ed] the Hobbs Act and [brought] into existence a new crime — local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun." J. Noonan, Bribes 586 (1984).
>
> After *Kenny*, federal prosecutors came to view the Hobbs Act as a license for ferreting out all wrongdoing at the state and local level — "a special code of integrity for public officials." . . . In short order, most other circuits followed *Kenny's* lead and upheld, based on a bribery rationale, the Hobbs Act extortion convictions of an astonishing variety of state and local officials, from a state governor down to a local policeman.

Evans v. United States, 504 U.S. at 290-292, 112 S. Ct. at 1901.

At the heart of the "new crime" under the Hobbs Act was receipt of money that could be a gratuity, in the sense of no *quid pro quo,* or a watered down formulation of that standard. As Justice Thomas suggests, the idea that money was given

"due to the office" was the creation of a new, previously unknown crime. In truth, it was a construct to enable federal prosecution of local corruption and to substantially reduce the quality of proofs needed to convict.

The Hobbs Act formulation as applied by the court below makes bribery the equivalent of extortion in color of office cases and then dilutes bribery into a hybrid crime created and since decided by circuit court precedent, *i.e.*, a peculiar species of bribery where only a diluted *quid pro quo* is needed. This judicially created crime is particularly vulnerable in the post *Sun-Diamond Growers* era for three separate reasons.

First, there exists today a heightened sense of federalism that was not present in the early 1990's when this Court decided *Evans*. Today, federalism discourages expanding by judicial fiat general federal laws into a "stunning" local sweep. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1998). Second, this Court's reasoning in *Sun-Diamond Growers'*, while based on statutory interpretation, effectively eliminates any distinction between gratuity and bribery and thereby undermines the very reasoning of the Hobbs Act cases which have created the hybrid Hobbs "color of office" gratuity crime. Finally, *Sun-Diamond Growers* results in a paradoxically higher standard of conduct for local officials than federal officials than for their federal counterparts. Federal officials are exposed under 18 U.S.C. § 201 to the criminal penalties for gratuity/bribery only when there is a *quid pro quo*; whereas, under the Third Circuit's formulation of Hobbs Act extortion, a local official may be exposed to the very severe penalties of the Hobbs Act in a mere color of office gratuity case without a finding of *quid pro quo,* as was Petitioner.

This approach is facially unlikely to withstand the scrutiny flowing from this Court's sensitivity to federalism concerns after *United States v. Lopez, supra.* and recent federalism cases collected at *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (U.S. Va. 2000). This is especially true when the judicially created definition of color of office extortion

is remarkably close to the statutory words interpreted by this Court in *Sun-Diamond Growers*.

For all of these reasons, the writ of certiorari should issue.

B. Petitioner did not deprive Philadelphians of his "honest services" by virtue of the activity pled and proven in the Ricciardi counts. Regardless, a new trial must be granted due to the insufficiency of materiality jury instructions.

The court below concluded that Petitioner violated the mail and wire fraud statutes because he had a financial interest in his girlfriend's expediting business of a type that violated city and state conflict of interest laws. By non-disclosure of this "financial interest" in Ricciardi's business, Petitioner somehow schemed to deprive the citizens of Philadelphia of their intangible right to his honest services. The court of appeals found that Petitioner engaged in acts of dishonesty such as failing to disqualify himself in matters of Ricciardi's expediting business as well as using his office for private pecuniary benefit to himself. Nonetheless, it was critical to the court's conclusion that at the time of mailings/wires, Petitioner had a "financial interest" in Ricciardi's business. *See* App. A at 39a-40a.

Petitioner's conviction was premised on a subtle and complex theory of indirect financial gain to Petitioner. However, Petitioner received no gain from Ricciardi's business. It was undisputed that Petitioner received no share of the proceeds. It was Ricciardi who received gain. Ricciardi's gain was claimed to be in lieu of or as a substitute for court-ordered *child support payments to his children.* On the theory as advanced and proven, Petitioner was the beneficiary of the arrangement because Ricciardi forgave a debt he owed – court ordered support to his children. Hence, Petitioner had a unique "financial interest" in Ricciardi's expediting business.

Facially, this theory appears absurd. The forgiven child support was in the amount of $60 per week and totaled approximately $32,000. Ricciardi worked in her expediting business for over ten years and by any stretch of the imagination,

generated receipts which dwarfed Petitioner's forgiven child support. Over a seven year period ending in 1995, Ricciardi earned gross receipts from her business in excess of $700,000. Petitioner's "financial interest" and "private pecuniary benefit", which allegedly created the conflict of interest under local and state law, were premised, according to the indictment and proofs, on the theory that the money Ricciardi would and did earn was in lieu of child support payments to her for their two children.

Obviously, there was a significant surplus of gain to Ricciardi after consideration of the forgiven child support. What happened to this surplus? The court below never answered this point, nor could it because it is self-evident that the dominant character of the arrangement had nothing to do with the modest court ordered support payments. The understanding was one of nepotistic gifting to a girl friend, plain and simple, not "discharge of debt", the stilted and inapposite theory advance by the government. Gifting girlfriends violated neither the local ethics rules nor federal law, notwithstanding the conclusions of the court below, at least not based on the theory advanced in this case.

The court below stated the government's prosecution theory to be as follows:

> The government's prosecutorial theory on this point [was] that [Petitioner] by failing to disclose his personal interest in a matter over which he had discretionary – decision making authority, deprived the public of its right to disinterested decision-making and of its right to full disclosure of his potential motivation. The scheme to defraud involved [Petitioner's's] setting up Ricciardi as an expediter, then preparing and approving her permits. Ricciardi received a fee for her "services" which in turn substituted for Petitioner's obligation to pay child support.
>
> The government [contended] that the requisite intent to defraud was met, in light of this scheme, by

> [Petitioner's] failure to disclose the nature of his personal interest in Ricciardi's business and to recuse himself from reviewing approvals submitted by her. Finally, the government contends, and [Petitioner] does not dispute on appeal that interstate phone calls and mailings were made in furtherance of the scheme.

App. A at 34a-35a. In this light, Petitioner's "interest" in Ricciardi's business flowed from the forgiven child support obligation, an amount which by all accounts Ricciardi would have earned long before the interstate phone calls or mailings at issue. Therefore, Petitioner's failure to formally disclose at the time of mailings and interstate telephone calls that which was common knowledge could not be material under this Court's jurisprudence.

In *McNally v. United States,* 483 U.S. 350, 107 S. Ct. 2875 (1987) this Court ruled that the federal mail and wire fraud statutes did not prohibit a scheme to defraud the public of intangible rights such as honest services of public officials. Congress responded with 18 U.S.C. § 1346, effective November 11, 1988, restoring pre-*McNally* law that such schemes were prosecutable under the fraud statutes, prospectively. The statute had no retroactive effect. *United States v. Grandmaison*, 77 F. 3d 555, 565-68 (1st Cir. 1996).

The body of law that has developed since suggests that the type of criminal behavior covered by the "deprivation of honest services" theory "eludes easy definition" but is generally directed at public officials who engage in "serious corruption, such as embezzlement of public funds, bribery of public officials or the failure of public decision-makers to disclose certain conflicts of interest". *United States v. Czubinski,* 106 F.3d 1069, 1076 (1st Cir. 1997), citing *United States v. Sawyer,* 85 F.3d 713, 723 (1st Cir. 1996). The *Czubinski-Sawyer* line of cases emphasize that the "broad scope" of the intangible rights theory does "not encompass every instance of official misconduct that results in the official's personal gain".

> *Sawyer* holds that the government must not merely indicate wrongdoing by a public officials but must also demonstrate that the wrongdoing at issue is intended to prevent or calling into question the proper or impartial performance of that public servant's official duties . . . [pre-McNally precedent demonstrates] that even where public officials violated state laws their actions were not found to defraud citizens of their right to honest services, because the officials did not actually fail to perform their official duties properly . . . In other words, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services and it is not shown to intend that result".

Czubinski, 106 F.3d at 1077.

Violations of public official workplace rules, even ethical standards, will not alone support a prosecution under this theory. This includes violation of IRS internal ethical rules by IRS employees. In *Czubinski* no violation was found on seemingly aggravated facts where an IRS employee, a KKK member, pulled IRS confidential tax information from computer data banks to develop dossiers on enemies and friends including an assistant district attorney and a political opponent, all of which was in violation of IRS internal ethical standards and rules. Defendant directly breached an IRS Rule of Conduct, an implementation of Congressionally required confidentiality for tax return information. Yet this was not a violation cognizable under 18 U.S.C. § 1346. *Id.*

In *Sawyer* a lobbyist's conferral of something of value in violation of a state gift statute was found insufficient, in itself, to establish a scheme to defraud the public of the intangible right to honest services. Lastly, in *United States v. Goldberg*, 928 F. Supp. 89 (D. Mass. 1996) the defendant attempted to

influence public officials concerning an eminent domain issue with which he was concerned by providing things of value, *i.e.*, free vacations at a summer home he had rented for the public official on Cape Cod. His pretrial attack on his indictment was unsuccessful but the district court aptly summarized the state of the law on intangible rights prosecutions of this sort as follows:

> . . . what the *Sawyer* opinion makes clear is that mere violation of state ethics law, standing alone, does not suffice to establish the intent to deprive the citizenry of the "honest services" of a government official and is therefore insufficient to establish a violation of the mail fraud statute. Something other than a state ethics law violation . . . [citing illustrations of proof of fraudulent intent or contemplation of actual harm or injury] . . . is necessary to support a mail fraud conviction under section 1346.

United States v. Goldberg, 928 F. Supp. at 89.

In the present case, Petitioner's purported child support obligation, assuming such was the motivation for setting up Ricciardi in business and helping her, was fully discharged under any stretch of the imagination by November, 1988, the date 18 U.S.C. § 1346 became effective. "Forgiven child support" was very meager compared to Petitioner's gift giving to Ricciardi. It is the nature of the arrangement as of November, 1988, not the arrangement in 1985 (when child support was ordered), that controls. Moreover, of equal importance, the dates chosen for wire fraud prosecution in counts 11-16 were all in December, 1993.[13] Ricciardi had been working as an expediter for *8 years* by the time the interstate telephone calls at issue in the substantive counts took place. Given this, it is an obvious stretch to contend that any wire communications were in furtherance of the scheme as pled. After 8 years Ricciardi was on her own and had received nearly one-half million dollars,

13. *See* App. A at 15a.

a lesser sum by November, 1988 but still considerably more than the child support obligation.

The evidence failed to show that as of late 1993 Petitioner had any financial interest in Ricciardi's expediting business that supported the crime set forth in this indictment. Obviously, a species of nepotism was continuing, but it invoked a loophole, the girlfriend, a circumstance not facially covered by the ethics rules[14] and, in any event, a quagmire Respondent avoided by charging the "discharge of debt" theory. Respondent's prosecutive theory and the reasoning of the court below were not premised on Ricciardi getting money for herself, despite the overwhelming weight of evidence showing that was what actually happened. Instead, discharge of debt was the theory advanced by Respondent and accepted by the Third Circuit. Petitioner's prospective private financial gain, not the children's gain, created the conflict of interest as charged.

No gain to Petitioner existed when 18 U.S.C. § 1346 was enacted, since all the existing and future child support obligations were discharged by enactment date. Therefore, the evidence was wholly insufficient to demonstrate that the wires selected for substantive prosecution, or for that matter the mailings in 1990, were in furtherance of the scheme as pled. Ricciardi was on her own, simply receiving a handsome income through Petitioner's help. With this understood, absent deceit, concealment, demonstrable public harm or other active fraud, nepotism of this sort at issue in this case is a crime.

Additionally, Petitioner is entitled to a new trial because in this pre-*Neder* but post-*Gaudin* case, materiality [in a non-disclosures concealment case] was not put to the jury as an element subject be proof beyond a reasonable doubt, a circumstance that cannot be dismissed as harmless error due to the absence of *mens rea* instructions or other instructions to illuminate for the jury what was material, and what was not material, to the government's case.

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14. Applicable ethics rules are set forth in notes 7 and 8 of the Court of Appeals Opinion. App. A at 13a-14a.

On June 10, 1999 (after trial in this case), this Court decided *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) holding, as here pertinent, that materiality is an element of a scheme or artifice to defraud under the mail/wire fraud statutes. Materiality must be put to the jury per the earlier rule of *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995). In Petitioner's view, materiality was not properly put to the jury as required under *Neder*. This issue was reviewed under a plain error standard as no objections were taken.

The jury instructions complained of below were fairly summarized by the Court of Appeals. Specifically, the Court of Appeals stated:

> The government must prove beyond a reasonable doubt that there was a "scheme or artifice to defraud", and define a scheme or artifice to defraud as, any plan, device, or course of action to obtain money or property or the intangible right of services by means of false or fraudulent pretenses, representations or promises reasonable calculated to deceive persons of average prudence. In describing "false and fraudulent representations," the district court stated: "The false or fraudulent representations or failure to disclose must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

App. A at 42a.

As recognized by the court below, the district court did not instruct the jury that materiality when based on failure to disclose (as distinguished from affirmative misrepresentations) had to be proven beyond a reasonable doubt, as required by *Neder*. Additionally, the district court specifically failed to relate such concept to the theory pled in the Ricciardi counts.

Although the court below properly reviewed this issue under a plain error standard, the court did rule on the merits – albeit

incorrectly – and did not hide behind the shield of harmless error analysis. *See* App. A at 41a-44a. With respect to the Ricciardi counts, the instructions gave no temporal or other point of reference to determine Petitioner's criminality. Honest services cases must be based on deceit, concealment or other forms of active fraud. *See United States v. Sawyer*, *supra*. The theory pled and proven in the fraud counts has been discussed above, involving as it does a concept which alleged that Petitioner had a financial interest in Ricciardi's business in violation of the terms of local and state ethics laws. *None of this was even mentioned to the jury.* It cannot be ascertained from the instructions whether the case was put to the jury on the theory Petitioner was alleged to have violated federal law because he failed to disclose the child support arrangement with Ricciardi or because he had assisted her business regardless of disclosure of the arrangement or whether violation of the state and local rules was in itself enough. The local laws themselves were not put before the jury during the instructions. The district court never instructed the jury on the core point, whether Petitioner had a statutorily prohibited financial interest in the expediting business. There simply was no point of reference for the criminality other than Petitioner had to possess an "intent to defraud".

Moreover, no instructions were put to the jury on the key issue of whether as of *December, 1993* (the date of the mailing at issue) Petitioner continued to have the "financial interest" in Ricciardi's expediting business that would have created a conflict of interest violation under Philadelphia/Pennsylvania ethics laws.

Finally, no instruction advised the jury that Petitioner had to know all this to be convicted on these counts – that he had a disclosable interest, that non-disclosure created a conflict, and that all this drove his non-disclosure as of December, 1993. These points all crystalized in the absence of materiality instructions on the nature of this particular prosecution, not mail/wire fraud cases in general.

C. The Case Should be Remanded for Resentencing Because the district court erroneously computed "loss" on the Fraud Counts

In calculating the fraud guidelines, the district court applied U.S.S.G. § 2C1.7. A relevant consideration under that guideline section is the "loss to the government or the value of anything obtained or to be obtained by a public official or those acting with a public official." U.S.S.G. § 2C1.7(b)(1)(A). In considering what loss or gain, if any, to consider under U.S.S.G. § 2C1.1(b)(1)(A), the district court referenced the in excess of $7000,000 of gross receipts earned by Ricciardi in her expediting business. The district court (with the blessing of the Third Circuit) was of the view that for purposes of that guideline section, U.S.S.G. § 2C1.1, the appropriate point of reference for loss/gain calculation is the gain to Ricciardi.

Petitioner unsuccessfully argued that any loss/gain consideration must be made by reference to the approximate $32,000 of forgiven child support. The theory under the fraud counts was that Petitioner breached his duty of faithful and loyal services to the City of Philadelphia by helping Ricciardi establish an expediting business in exchange for his not having to pay child support. In other words, he should have disclosed his financial interest in the Ricciardi business and disqualified himself from connection with the affairs of that business. Therefore, under Petitioner's argument, the maximum gain to Petitioner and the figure which should have been used as a point of reference under U.S.S.G. § 2C1.1(b)(1)(A) was approximately $32,000.

As a general proposition, loss in a fraud case is the amount/value of property taken or the gain received. The application notes to U.S.S.G. § 2F1.1 define "loss" as "the value of property taken, damaged or destroyed". *See* U.S.S.G. § 2B1.1, application note 8. Where determination of loss is difficult, courts look to the gain received by the defendant if it provides a reasonable approximation of the losses at issue. *See United States v. Anderson*, 45 F.3d 217 (7th Cir. 1995); *United States v.*

Galbraith, 20 F.3d 1054 (10th Cir. 1994); *United States v. Haddock*, 12 F.3d 950 (10th Cir. 1993). Here, if gain is used the figure is substantially less than $700,000.

Viewed through the prism of Ricciardi's own actions, there appears to have been zero loss to her clients. No customer was deprived of anything by hiring Liz Ricciardi. In fact, Ricciardi provided services as paid for by the customers. In addition, Ricciardi never paid any portion of her receipts to Petitioner. Also of significance is the fact that notwithstanding Petitioner's conviction, the evidence revealed *de facto* disclosure of Petitioner's relationship with Ricciardi as well as the fact that he was helping her in her expediting business in lieu of his child support payments. The subject was common knowledge around L&I.

The Third Circuit's decision in *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996) illustrates the error in calculating loss by reference to Ricciardi's income. *Maurello* involved a case where a disbarred attorney was convicted of mail fraud and credit card fraud. Though Maurello had been disbarred, he continued to practice law and billed clients for legal services. The district court determined the loss to be the total of all the fees Maurello earned from this fraudulent practice of law. The Third Circuit reversed this aspect of the case because the majority of Maurello's clients received what they paid for, i.e., legal services, despite the fact he had inveigled them into obtaining and accepting his services by fraud. Consequently, the court remanded the matter to the district court to determine the extent to which Maurello's clients were dissatisfied with his services. "Loss", for purposes of U.S.S.G. § 2F1.1 would be calculated based only on instances where a consumer paid for something but did not get what he/she expected.

In Petitioner's view, his case and *Maurello* may not be a perfect fit but they are close. The fraud here was on the citizens of Philadelphia based on Petitioner's conflict of interest. But the trial evidence showed that although Petitioner had set Ricciardi up in the business and at first took an active role in referring clients and helping with her work, that gradually phased

out to the point where Ricciardi in a sense was on her own. Income during that later phase cannot be the measure of the "loss" without a particularized inquiry – which was not made by the district court – of the relationship between the proceeds and Petitioner's conflict of interest. Towards the end, the latter had little or nothing to do with the former.

The Court of Appeals distinguished Petitioner's case from its own cases in *Maurello* and *United States v. Hayes*, 242 F.3d 114 (3d Cir. 2001) because those cases involved interpretations of U.S.S.G. § 2F1.1 and not a specific interpretation of U.S.S.G. 2C1.7(b)(1)(A). The Third Circuit hung its analytical hat on the fact that U.S.S.G. § 2C1.7(b)(1)(A) provides for consideration of loss to the government or value of anything obtained by the public official or *others acing with a public official.* App. A at 52a-55a. The court went on to state that given the inclusion of the phrase "or others acting with the public official" justified calculating the loss in Petitioner's case by reference to the gross receipts Ricciardi earned through her expediting business.

These analytical gymnastics, however, ignore the essential nature of the fraud charges at issue in this case, specifically, that Petitioner breached his duty of loyal services by failing to disclose his financial interest in Ricciardi's business – the financial interest being defined by reference to his child support obligations. In this light, it seems that the approach applied and adopted by the courts below substantially overstates how the guidelines should be calculated in this case, and consequently, this Court in issuing a writ of certiorari should agree to review this question as well. Fundamental fairness so requires.

CONCLUSION

This case presents several questions of exceptional importance. First, this Court now has the opportunity to clarify and/or fine tune its holdings in *McCormick-Evans*. This Court can now – with consideration of heightened federalism concerns – clearly state exactly what is required in a color of right extortion case. The circuit court jurisprudence on this issue is "all over the map" and hence, for this reason alone, the writ should issue.

Additionally, for the reasons discussed above, this Court should take this opportunity to rectify the other inequities underlying Petitioner's conviction and sentence on the fraud counts.

Respectfully submitted,

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Dated: June 3, 2002

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 28, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed November 28, 2001

No. 00-1446

UNITED STATES OF AMERICA,

v.

FRANK ANTICO,

Appellant.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 98-242-01)
District Judge: Honorable Jan E. DuBois

Argued: April 5, 2001
Before: SCIRICA, AMBRO AND GIBSON*
Circuit Judges

(Filed: November 28, 2001)

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

OPINION OF THE COURT

AMBRO, *Circuit Judge*:

Frank Antico, Sr. ("Antico") appeals his conviction and sentence in the United States District Court for the Eastern District of Pennsylvania ("District Court") on one count of racketeering in violation of 18 U.S.C. § 1962(c) — part of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[1] nine substantive counts of extortion in violation of 18 U.S.C. § 1951 (known as the Hobbs Act), and eight substantive counts of wire fraud in violation of 18 U.S.C. § 1343.

On appeal, Antico asserts that he is entitled to a new trial for three reasons: (1) the District Court's failure to instruct the jury, during its charge on Hobbs Act extortion, of the necessity of finding an inducement or a *quid pro quo*; (2) the failure of the Government to prove a scheme to defraud the citizens of Philadelphia of their intangible right to his honest

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1. Section 1962(c) provides that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In order to find a pattern of racketeering activity, the Government must prove that at least two of the sixteen racketeering acts charged were connected by a common scheme, plan or motive, and that at least two of the racketeering acts were committed within ten years of each other (one of which occurred within the five year statute of limitations).

services; and (3) the insufficiency of the District Court's jury instruction on materiality as an element of wire fraud. We reject these allegations of error and affirm Antico's conviction on Counts One through Sixteen of the superseding indictment.

Antico also argues that his conviction of wire fraud on Counts Seventeen and Eighteen, which involve his securing permits for a prostitution business after he left the City of Philadelphia's Department of Licenses and Inspections, should be reversed as a result of the Supreme Court's ruling in *Cleveland v. United States*, 531 U.S. 12 (2000), that such a permit does not constitute property within the meaning of the wire fraud statute. We agree, and reverse Antico's conviction on these counts.

Finally, Antico challenges the District Court's enhancement of his sentence for a leadership role in an otherwise extensive criminal extortion activity and its loss computation on the wire fraud counts. In light of our reversal of conviction on two of the wire fraud counts, and for other reasons stated in this opinion, we vacate Antico's sentence and remand to the District Court for resentencing.

I. Factual and Procedural Background

Antico's indiscretions, which we summarize in this section, expose a pervasive abuse of government services. In the following recitation of the schemes on which Antico's conviction was based, we construe the facts in the light most favorable to the Government, as we must following the jury's guilty verdict. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Appendix A

Between 1983 and January, 1996, Antico held various positions at the Department of Licenses and Inspections ("L & I") for the City of Philadelphia (the "City"). L & I's function is to administer and enforce the City's code requirements, including building, electrical, fire, health, housing, business, and zoning regulations. Officials of L & I are empowered to issue zoning and use permits and licenses according to a first-come-first-served policy, conduct inspections, and enforce applicable codes and regulations through citations and cease and desist orders. Persons aggrieved by these decisions may appeal to the Zoning Board of Adjustment ("ZBA"). Antico worked at L & I at various times as a Zoning Examiner, a Code Administrator, and the Business Regulatory Enforcement Director. In these positions, he had the discretionary authority to approve zoning and use permits and licenses, and to cite and close businesses for violations of the City's ordinances and the laws of Pennsylvania, particularly those governing adult cabarets and topless bars. The extortion and wire fraud schemes that Antico concocted while he was a public official at L & I and after he left its employ are detailed below.

A. Extortion Schemes — RICO Acts 1-13, 15, 16 and Extortion Counts 2-10

1. Extortion of Westside Check Cashing

On December 22, 1994, L & I closed for zoning violations one of Westside Check Cashing's stores, located at 5th and Lehigh Avenues in Philadelphia. The controller of the check cashing business met with Antico the next day to discuss

reopening the business. Antico explained that Westside had to file a new application for a zoning and/or use registration permit and make other changes.

Several days later, Antico called the controller and the owner of the business and told them he wanted a piece of jewelry to give to his wife for their anniversary. They selected some items, including a diamond pendant appraised at $3,275, and sent them to Antico's office by courier. The owner and his controller testified that they decided to send the jewelry to Antico and not bill him for it because of Antico's position with L & I. The zoning issue that led to the store closing on December 22 was still pending and they were concerned that Antico would use his position with L & I to keep the business closed. They understood from their conversation with Antico that he did not intend, nor did he ever offer, to pay for the jewelry. Once the conditions of the permit were satisfied, Antico permitted the store to reopen.

2. Extortion of Maureen McCausland[2]

Maureen McCausland met Antico in 1983 when Antico was working in L & I's zoning section. McCausland approached Antico to obtain a zoning and/or use permit registration for a prostitution business at 2132 Market Street in Philadelphia. Her zoning application read "nude modeling studio" and Antico advised her instead to call the business a "modeling studio" on the application. McCausland did so, and she received the license. She later paid Antico $500 for getting the permit for her.

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2. The Maureen McCausland extortion scheme was charged as a racketeering act but not a separate, substantive Hobbs Act extortion count.

This began a pattern of Antico receiving payments from McCausland for approval of zoning and/or use registration permits for a number of other prostitution businesses she opened over the years. She paid Antico $500 when she applied for the permit and $500 when she received it. McCausland also paid Antico additional sums of money and had sex with him so that he would use his position at L & I to protect her business. For example, when Antico was placed in charge of enforcement, he alerted her to the police department's efforts to close her business. McCausland estimated that Antico extorted approximately $8,000 from her during the period covered by the superseding indictment.

McCausland's testimony was corroborated by the applications for zoning and use registration permits introduced into evidence. These applications were prepared by Antico and listed the use as "modeling studio" or "physical therapy."

3. Extortion of Adult Cabarets in Philadelphia — Wizzards, Pin Ups, Tattletales and Teazers

Between 1993 and 1995, Antico served as the Business Regulatory Enforcement Director for L & I, supervising the unit that enforced compliance with the zoning code. Most pertinent to this scheme, Antico was responsible for regulating adult cabarets and their compliance with the zoning code.

The Philadelphia Code defines an adult cabaret as "[a]n adult club, restaurant, theater, hall or similar place which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators or similar entertainers

exhibiting specified anatomical areas or performing specified sexual activities." Philadelphia Code § 14-1605. A business that meets this definition is considered a regulated use and is prohibited from operating within 1,000 feet of another regulated use or within 500 feet of a residential area. According to L & I policies, all adult cabarets are required to be licensed or to receive a variance from the ZBA. In addition, the dancers at a licensed cabaret (or a cabaret permitted to operate as such while it sought a license) cannot perform in a lewd or obscene manner.[3]

a. Wizzards

The scheme with respect to Antico's extortion of Wizzards began with John Messina, John Meehan, and Frank Antico, Jr. (Antico's son) forming Pan Enterprises, Inc. to operate Wizzards, an adult cabaret located at 38th and Chestnut Streets in Philadelphia. Initially, Messina provided the start-up money and held 89% of the corporation. Messina gave 10% and the manager position to Meehan because of his experience in operating topless clubs. Meehan, in turn, introduced Messina to Antico, Jr.

Meehan and Antico, Jr. told Messina that if Antico, Jr. received a 1% interest in Pan Enterprises and a position as a weekend manager, defendant Antico would use his position

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3. L & I incorporated the Philadelphia Code definition of obscenity in determining what constituted a lewd performance by a dancer. *See* Philadelphia Code §§ 10-1100 through -1103. Dancers were thereby prohibited from touching patrons and participating in actual or simulated sexual acts on stage. Additionally, the dancers were required to wear bottoms and latex pasties to cover their breasts.

with L & I to help Wizzards operate. Messina agreed to this arrangement and to paying Meehan and Antico, Jr. part of their weekly salaries in cash without reporting it to the taxing authorities.

Antico guided Wizzards through the permitting and licensing process at L & I. In addition, when Wizzards opened for business on September 23, 1993, Antico arranged to have two competing clubs shut down for code violations. After Wizzards opened, Antico frequented the club and received complimentary drinks, food, and parties for himself and his friends. While Antico was present, the dancers violated the code restrictions on lewd dancing, yet Antico issued neither citations nor cease and desist orders.

After operating Wizzards for a few months, Messina and other investors began to quarrel with Meehan and Antico, Jr. over the club's management. Although the club was crowded and appeared to be doing well, the books did not reflect this success. When Messina and the investors tried to take a more active role in the club's management, Meehan and Antico, Jr. objected and threatened to have L & I shut the club down. In fact, in March 1994, Antico came into the club and closed it down because the dancers were performing in a lewd manner. A former employee of Wizzards testified that Meehan told that employee that he knew the club would be shut down, but would be permitted to reopen the next day. According to this employee, Meehan was "flexing his muscles."

In June 1994, Eugene Johnson took over Messina's ownership interest in Wizzards as repayment of a debt. Johnson brought in Dorothy Davis from his New Jersey

establishment to observe how Meehan and Antico, Jr. operated the club. Davis reported that most of the employees, including Meehan and Antico, Jr., were getting paid cash under the table, that Antico, Jr. was being paid a large salary for doing very little, and that the dancers were performing in violation of the L & I policies. Johnson instructed Davis to put all employees on the books, cut Antico, Jr.'s salary or fire him, and require all dancers to conform to L & I restrictions on dancing.

When Davis informed Meehan of these instructions, Meehan responded that Antico, Jr.'s father was the head of L & I and that Wizzards was operating at his mercy. On June 16, 1994, Meehan and Antico, Jr. resigned their employment with Wizzards. Within two hours defendant Antico closed Wizzards for lewd dancing.

b. Pin Ups

In August of 1995, Antico, Antico, Jr., and Meehan met with the owners of Pin Ups to discuss the sale of the club to Antico, Jr. and Meehan. At a follow-up meeting, the owners turned down the offer made by Antico, Jr. and Meehan. Two weeks later, on September 8, 1995, L & I inspectors arrived at Pin Ups, conducted an inspection and closed the club for electrical violations.

Prior to the closure, some of the Pin Ups dancers knew the club was going to be shut down and arranged to dance at Tattletales, another topless club located nearby. The owners of Tattletales also knew that Pin Ups was going to be shut down and arranged for additional staffing and liquor for the night.

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On the night of the inspection, one of the owners of Pin Ups, suspecting that the closure was in response to their refusal to sell the club, told defendant Antico that if Pin Ups was not reopened the next day, he was going to "call the Feds." Antico permitted Pin Ups to reopen before the electrical violations were corrected.

c. Tattletales

Steve Owens and Greg Bertino opened Tattletales in July 1995. Antico was a regular customer and advised the two on the Code and the obscenity rules. Antico took them to other topless clubs to view couch dancing and urged them to put a couch dancing room into Tattletales. Antico told them to call him if they ever had any problems.

Despite Antico's advice, the dancers at the club did not follow the dancing restrictions or the Code. Antico, however, did not cite the club for violations. Instead, he was treated to free drinks, meals, and couch dances. Owens and Bertino did this to gain favor with Antico and to maintain good relations with L & I. The two also gave Antico $500.

d. Teazers

Thomas Killeen was an owner of Teazers, a topless club located at 20th Street and Oregon Avenue in Philadelphia. In connection with the opening on September 23, 1993 of Wizzards, Antico closed Teazers and another bar owned by Killeen because the dancers were violating L & I restrictions.

Appendix A

Subsequent to its reopening, Antico began to patronize Teazers. Killeen would socialize with Antico and give him free drinks. Antico eventually asked Killeen for, among other things, the repeated use of one of Killeen's limousines from his limousine company. Killeen acquiesced because of Antico's position in L & I and never billed him for the use. Killeen ultimately hired limousines from other companies because he did not want Antico to be seen in one of his vehicles. In addition, Antico asked for, and Killeen let him use, six field-level box seats for several Phillies games. Antico gave Killeen a list of games he wanted to attend and sent an L & I employee to pick up the tickets.

4. Beach Club

Frank Cascerceri was the owner of the Beach Club, a nightclub formerly located along the Delaware River in Philadelphia. Cascerceri testified that he built a pool at the club and hired an expediter[4] to apply for permits from L & I. The expediter prepared the necessary application and filed it with L & I. Because the club was scheduled to open in the Spring of 1993, Cascerceri became frustrated when L & I delayed issuing the permit. He called Antico and explained the urgency of getting the permit. Antico told him that he was using the wrong expediter, and that he should hire

4. Expediters are independent contractors who, in exchange for a fee, represent individuals and businesses before L & I and the ZBA. Expediters typically prepare the paperwork required to obtain permits, licenses, or variances by L & I or the ZBA. Expediters may interact with employees of L & I during the process, and appear at public hearings before the ZBA.

Elizabeth Ricciardi[5] to expedite his application for the permit. Antico spoke to Ricciardi before Cascerceri did and urged her to take the employment.

To avoid the risk of not getting L & I approval, Cascerceri hired Ricciardi. He paid her $625 for her assistance, although Ricciardi testified that she did very little to obtain the permit. Shortly after he hired Ricciardi, Cascerceri received his approval from L & I.

5. Extortion of Barbara Williams[6]

Barbara Williams worked as an expediter in Philadelphia from 1984 to 1989. To circumvent L & I's first-come-first-served rule of processing applications, Williams would turn to Antico on her urgent matters and pay him to process her paperwork ahead of others. She also paid Antico to prepare particularly complex zoning applications. Typically, Williams would give Antico batches of permits to process at one time, and paid him according to the number of applications he processed. The payments ranged from $30 to $75 per application. Williams estimated that Antico extorted approximately $5,000 from her during her work as an expediter.

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5. Ricciardi is the subject of the mail and wire fraud racketeering acts and the substantive wire fraud offenses in Counts 11-16. See the discussion of the Ricciardi mail and wire fraud schemes, *infra* at part I.B.

6. The Barbara Williams extortion scheme was charged as a racketeering act but not a separate Hobbs Act extortion count.

Appendix A

B. Mail and Wire Fraud Scheme Involving Elizabeth Ricciardi — RICO Acts 14A-F and Wire Fraud Counts 11-16

Antico's employment with L & I required him to refrain from using his position to secure advantages for himself or his family members. The Philadelphia Code provides that city employees must disclose publicly a conflict of interest and recuse themselves from taking any official action in a matter where they have a financial interest.[7] In addition, state ethics laws prohibited him from using his employment for private pecuniary gain.[8] *See* 65 Pa. C.S.A. §§ 401-409,

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7. Section 20-607 of the Philadelphia Code, titled Conflict of Interest, states in relevant part:

> Unless there is public disclosure and disqualification . . ., no City officer or employee shall be financially interested in any legislation, including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity . . ., nor shall any financial interest be held by a parent, spouse, child, brother, sister or like relative-in-law, or by any person, firm, partnership, corporation, business association, trustee or straw party for his or her benefit.

8. The State Ethics Act provides that "[n]o public official or public employee shall engage in conduct that constitutes a conflict of interest." 65 Pa.C.S.A. § 403. The Ethics Act defined a conflict of interest as follows:

> Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of

(Cont'd)

repealed by P.L. 729, No. 93, § 6(a)(2) (Oct. 15, 1998), *and replaced with* 65 Pa. C.S.A. §§ 1101.1-1108. These code provisions are implicated by Antico's arrangement with Elizabeth Ricciardi.

In the late 1980s, Ricciardi had two children by Antico. Initially, Antico failed to make child support payments, forcing Ricciardi to file a child support petition in the Philadelphia Court of Common Pleas, Family Court Division. The child support order at that time was $600 per week. Antico volunteered to pay child support if Ricciardi would withdraw the petition, which she agreed to do. He made three payments, then stopped.

In lieu of the payments, Antico offered to establish Ricciardi as an expediter. She was reluctant to accept, knowing nothing about the expediting business, but Antico told her that he would take care of everything. This was not an empty promise. Antico referred clients to Ricciardi who

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(Cont'd)

> himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a *de minimis* economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

65 Pa.C.S.A. § 402. The statute currently in effect is virtually identical to the provision cited above. See 65 Pa.C.S.A. § 1102.

needed licenses and permits from L & I. Ricciardi would call Antico when a client hired her. Antico would then tell Ricciardi how to fill out the applications or would complete them himself. Ricciardi was known to use Antico's office at L & I to do her work, and he would have city employees pick up and deliver her paperwork and watch her children. Antico personally worked on 564 of the 748 building permit, and 288 of the 322 zoning permit, applications filed by Ricciardi and submitted them under her name.[9] Moreover, Antico was the one who approved the permits and applications submitted by her business. Antico neither publicly disclosed a conflict of interest nor disqualified himself from taking official action in these matters, as required by Section 20-607 of the Philadelphia Code. As a result of this arrangement, Ricciardi admits to earning over $700,000 during the course of the arrangement.

In 1993, upon discovering that Antico was signing permit applications on behalf of Ricciardi, L & I Commissioner Levin transferred Antico and moved the responsibility for permit approvals to a different manager. Antico was no longer the head of the zoning department, and his job responsibilities no longer included approving permit applications.

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9. The Philadelphia Sign Company, located in New Jersey, was one of Ricciardi's clients. Telephone calls from Ricciardi in Philadelphia to the client in New Jersey on six separate occasions in December of 1993 serve as the basis for the substantive wire fraud offenses in Counts Eleven through Sixteen. The use of the mails with respect to the same client constituted the mail fraud racketeering acts proven as predicate acts under the RICO Count.

Appendix A

C. Wire Fraud Scheme Involving Maureen McCausland Counts Seventeen and Eighteen[10]

In January 1996, Antico left L & I and established an expediting business in Philadelphia under the name Frank P. Antico, Zoning Consultant, Advisor, and Technician of the Philadelphia Code. In 1997, Maureen McCausland requested Antico's services to reopen a prostitution business. Unbeknown to Antico, McCausland was cooperating with the Federal Bureau of Investigation ("FBI") at the time and this request was part of a Government operation. Antico assisted McCausland with her permit application, which declared the facility to be a modeling studio/physical fitness business at 1212 Walnut Street, Philadelphia.[11] Antico attempted to hide his involvement by having another expediter submit the applications.

* * * * *

On September 30, 1998, a federal grand jury in the Eastern District of Pennsylvania returned an eighteen count superseding indictment. The Government charged Antico with sixteen racketeering acts under the umbrella of one RICO count (Count One), nine of which were also charged as substantive Hobbs Act extortion counts (Counts Two through Ten), and six of which were charged as substantive

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10. The Maureen McCausland wire fraud scheme charged in Counts Seventeen and Eighteen is not part of the RICO Count.

11. The two communicated via interstate phone calls to set up meetings to discuss the application and how to circumvent the L & I regulations. These conversations were taped by the FBI.

wire fraud counts (Counts Eleven through Sixteen). Antico was charged with two additional substantive wire fraud counts (Counts Seventeen and Eighteen) that do not fall under the RICO umbrella count. The jury convicted Antico of all eighteen counts in the superseding indictment. With respect to the RICO count, the jury concluded that fifteen of the sixteen predicate racketeering acts were proven.[12]

On April 28, 2000, Antico was sentenced to terms of sixty-three months imprisonment on Counts One through Ten (RICO and extortion) and to terms of sixty months imprisonment on Counts Eleven through Eighteen (wire fraud). All terms were to be served concurrently.[13] In addition, Antico was sentenced to three years supervised release, ordered to pay a fine of $10,000 and a special assessment of $1,000, and ordered to forfeit $52,900.

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12. The jury concluded that Racketeering Act 2 was not proven. This act, which occurred in March 1993, was the exchange of $500 for obtaining the zoning and/or use registration permit that falsely declared that McCausland operated a "modeling studio" at 2132 Market Street. However, this is not fatal to the conviction on the RICO count because the jury concluded that Racketeering Acts 3 through 6, which pertained to the same extortion scheme involving McCausland, as well as Racketeering Acts 7 through 16, were proven.

13. The District Court grouped for sentencing purposes the RICO and extortion counts in one group and the wire fraud counts in a second group. It then imposed a sentence based on the groups rather than on the individual counts.

Appendix A

II. Legal Discussion

This Court has jurisdiction of an appeal from a judgment of conviction and sentencing pursuant to 28 U.S.C. § 1291. On appeal, Antico alleges three points of trial error and challenges his sentence on two grounds. We address each allegation of error in turn.

A. Requirement of Inducement or *Quid Pro Quo* in Hobbs Act Extortion

Antico challenges the District Court's instructions to the jury with respect to Hobbs Act extortion under "color of official right." The Hobbs Act provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —
>
> . . .
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or under color of official right.*

18 U.S.C. § 1951 (emphasis added). Thus, the statute supports two classes of extortion: extortion induced by "wrongful use of force" and extortion "under color of official right."[14] The latter is at issue in this case.

Specifically, Antico argues that the District Court should have charged the jury to determine whether he induced his extortion victims into giving him gifts and favors with a promise or threat of an official act in return or, at a minimum, that a *quid pro quo* was reached between them. This Court exercises plenary review over the alleged failure of the District Court to charge the jury properly on a matter of law. *United States v. Bradley*, 173 F.3d 225, 230 (3d Cir. 1999).

1. Inducement

With respect to Antico's claim that an inducement instruction should have been charged to the jury as per subsection (b)(2) of the Hobbs Act, the Supreme Court in *Evans v. United States*, 504 U.S. 255 (1992), clearly rejected inducement as an element of the offense of extortion "under color of official right." *Id.* at 256. The Supreme Court affirmed the ruling of the Court of Appeals for the Eleventh Circuit, which held that

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14. *See United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982) (ruling Hobbs Act covers actions by public officials under color of official right even when the payment is not obtained by force, threats nor use of force); *United States v. Margiotta*, 688 F.2d 108, 130-31 (2d Cir. 1982) ("The public officer's misuse of his office supplies the necessary element of coercion, and the wrongful use of official power need not be accompanied by actual or threatened force, violence or fear.").

> the requirement of inducement is automatically satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. The coercive nature of the official office provides all the inducement necessary.

United States v. Evans, 910 F.2d 790, 796-97 (11th Cir. 1990). Relying on the common law of extortion, the Supreme Court agreed and held that "the word 'induced' is a part of the definition of the offense by the private individual, but not the offense by the public official. . . . The statute merely requires of the public official that he obtain 'property from another, with his consent, . . . under color of official right.' " *Evans*, 504 U.S. at 265. Thus, Antico's claim that an inducement instruction should have been given fails.

2. *Quid Pro Quo*

Antico also asserts that the District Court should have charged the jury to find a specific *quid pro quo*. He cites to a trilogy of Supreme Court cases — *McCormick v. United States*, 500 U.S. 257 (1991), *Evans v. United States*, 504 U.S. 255, and *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398 (1999) — in support of his argument.

Antico begins by citing to the cornerstone Supreme Court case on Hobbs Act extortion — *McCormick*, which held that an explicit *quid pro quo* is necessary for conviction under the Hobbs Act when a public official receives a campaign contribution. In *McCormick*, the Supreme Court ruled that

the District Court erred by instructing the jury that such a *quid pro quo* was not necessary. *McCormick* 500 U.S. at 274.[15]

The logic the Supreme Court employed in *McCormick* follows the fine line between what is legal campaign activity and the "forbidden zone of conduct."

> [T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

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15. The District Court's instructions in *McCormick* did not omit passively a *quid pro quo* element, as the District Court did in the case before us. Instead, the District Court affirmatively stated that "it is *not necessary* that the government prove that the defendant committed or promised to commit a *quid pro quo*, that is, consideration in the nature of an official action in return for the payment of the money not lawfully owed." *Id.* at 261 n. 4 (emphasis added).

Id. at 272-73.

Because the line is so subtle, the Supreme Court ruled in *McCormick* that an overt *quid pro quo* is a necessary proof in the context of campaign contributions.

> The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

Id. at 273.

Antico appears to favor extending the *McCormick* explicit *quid pro quo* ruling to non-elected public employees outside the context of campaign contributions because the state of mind necessary to convict in the two contexts is the same. However, the Supreme Court noted that its holding was limited to campaign contributions.

> McCormick does not challenge any rulings of the courts below with respect to the application of the Hobbs Act to payments made to nonelected officials or to payments made to elected officials that are properly determined not to be campaign

> contributions. Hence, we do not consider how the "under color of official right" phrase is to be interpreted and applied in those contexts.

Id. at 268-69. In light of this express limitation, we decline Antico's invitation to extend *McCormick* to apply to his situation. The *quid pro quo* can be implicit, that is, a conviction can occur if the Government shows that Antico accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity "under color of official right."

In *Evans*, decided one year after *McCormick*, the Supreme Court ruled that a jury instruction containing an implicit, as opposed to an explicit, *quid pro quo* requirement in the context of campaign contributions passed muster under *McCormick*. The Supreme Court stated:

> We reject petitioner's criticism of the instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick v. United States*, because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense. . . . We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.

Evans, 504 U.S. at 268. In other words, no "official act" (i.e., no "quo") need be proved to convict under the Hobbs Act. Nonetheless, the official must know that the payment — the "quid" — was made in return for official acts.

Outside the campaign contribution context, where Antico's case falls, the line between legal and illegal acceptance of money is not so nuanced. The Hobbs Act simply states that use of one's office to obtain money or services not due is extortion: "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* Antico would read into the phrase "knowing the payment was made in return for official acts" a requirement that the jury be instructed using the express words *"quid pro quo."*

We echo the Supreme Court's satisfaction with an implicit *quid pro quo* requirement. In *United States v. Bradley*, 173 F.3d 225 (3d Cir. 1999), we considered the question of whether, in a non-campaign contribution Hobbs Act extortion case, an express agreement must be shown. Relying on Justice Kennedy's concurrence in *Evans*, we agreed that " 'the official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods.' " *Bradley*, 173 F.3d at 231 (citing *Evans*, 504 U.S. at 274).

In addition, we rejected Antico's argument when we affirmed, in part, the District Court's holding in *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), *affirming in part and dismissing on other grounds*, 827 F. Supp. 1153

(E.D. Pa. 1993). Analyzing both the *McCormick* and *Evans* cases, the District Court in *McDade* concluded that "[g]iven the language of the Supreme Court's opinion, I find that *McCormick* does not require a *quid pro quo* for extortion outside the context of campaign contributions." 827 F. Supp. at 1171; *accord United States v. Davis*, 967 F.2d 516 (11th Cir. 1992). "[S]ince I can find no language in the Opinion of the Court in *Evans* which explicitly extends the *quid pro quo* requirement, and since the facts of *Evans* did not require the Court to extend *McCormick*, I respectfully do not interpret the Court's opinion so broadly as did those concurring and dissenting Justices [in *Evans*]." *McDade*, 827 F. Supp. at 1171 n.8. We reiterate our agreement with *McDade*.

The relevant inquiry is whether the District Court's instruction satisfied the implicit *quid pro quo* requirement where non-campaign contribution Hobbs Act "color of official right" extortion is charged. A closer look at *Evans*' language on *quid pro quo*, as well as *Bradley* and *McDade* and the District Court's decision, all of which dealt with "color of official right" Hobbs Act extortion outside the campaign contribution context, lead to the conclusion that the District Court did not err in its jury charge. The proper instruction, as per the *Evans* Court, is "that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 504 U.S. at 268. The jury instruction we affirmed in *Bradley* reads as follows:

> So if a public official agrees explicitly or implicitly to take or withhold some action for the purpose of obtaining money for someone else, that constitutes extortion. The public official need not fulfill the promise of the payor to do or not to do an official act, although the official's failure to influence may be considered along with all of his conduct in determining whether or not he possessed the intent to commit the crime. The crime is completed at the time when the public official knowingly accepts the benefit in return for his agreement to perform or not to perform an act related to his office. Moreover, *the government does not have to prove that there was an express promise on the part of the public official to perform a particular act at the time of the payment.*
>
> *In sum then, it is sufficient if the public official understands that he is expected, as a result of the payment, to exercise particular kinds of influence or to do certain things connected with his office as specific opportunities arise.*

Bradley, 173 F.3d at 231 (emphasis added).

The District Court's charge to the jury in Antico's case, after specifically reading the relevant portions of the Hobbs Act, was as follows:

> Extortion under color of official right is the use of one's position as a public official or the authority

of public office to obtain money or services not due the official or his public office. Such extortion violates the Hobbs Act.

. . .

If you decide that the defendant was given money or goods or services not due the office he represents, you must then decide whether the defendant used the authority of his office or position to obtain the money, goods or services. The third element is wrongful obtained consent of the giver. The Government must prove beyond a reasonable doubt that *these items were given to the defendant in connection with his power and authority as a public official.*

The giver may have initiated the exchange and the parties may be on friendly terms. These are factors to be considered in deciding whether the giver gave the payments, goods or services because *he believed the defendant would use his office for acts not properly related to his official duty* or whether instead the giver was making a voluntary contribution.

Unless you decide beyond a reasonable doubt that the defendant knew the giver's consent was wrongfully obtained, that is, that the money, goods or services were given in connection with the defendant's misuse of his official position rather than being given voluntarily, you cannot convict the defendant.

(Emphases added).

No specific instruction to find an express *quid pro quo* was given. Nor did the District Court specifically negate such a requirement as the trial court did in *McCormick*. As the District Court noted, "I didn't not grant the Government's points, by the way, . . . which asked me to charge that no *quid pro quo* was required and no inducement was required. I just didn't charge it." Antico argues that a jury instruction failing to mention *quid pro quo* falls short of the mark.

We disagree with Antico's interpretation of the Supreme Court's intent. Considering the District Court's instructions as a whole, and the highlighted phrases in particular, which require a finding of Antico's knowledge of a "connection" between the payment and the misuse of his office, we find that they sufficiently convey the implicit *quid pro quo* approved in *Evans* and *Bradley*. As a result, the District Court did not err in its charge to the jury. If Antico knew that payments or other consideration were extended to him to secure unwarranted favorable treatment in his official capacity, he is guilty of Hobbs Act extortion under color of official right without the need to prove that the official action (or inaction) occurred.

Lastly, Antico cites to the recent case of *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398 (1999), as an affirmation that the Supreme Court has retreated from its holding in *Evans* and returned to the position in *McCormick* that an express *quid pro quo* must be found. Notably, however, the *Sun Diamond* case was brought under the federal gratuity statute, 18 U.S.C. § 201(b)(2), not the Hobbs Act.

The crime of illegal gratuity "requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), for or because of any official act performed or to be performed by such public official." *Id.* at 404. The Supreme Court reasoned that "[t]he insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Id.* at 406.

As a result, the Court held in *Sun Diamond* that, "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414. Again, noting the subtle distinction between what is legal campaign activity and the "forbidden zone of conduct," the Supreme Court recognized the peculiar results if it were to convict without a finding of any connection between the public official's intent and a specific official act. "It would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act — such as the replica jerseys given by championship sports teams each year during ceremonial White House visits." *Id.* at 406-07. Thus, in the context of campaign contributions under the illegal gratuity statute, *Sun Diamond* requires proof of a specific "quo," which Antico argues necessitates an express *quid pro quo* jury instruction.

In contrast to the illegal gratuity statute, the Hobbs Act, as interpreted by both the Supreme Court and our Court, contains no express *quid pro quo* requirement in the non-campaign contribution context. The concerns over illegal campaign contributions addressed by the gratuity statute and the Hobbs Act — solved by an express *quid pro quo* requirement in those cases — do not automatically carry over to the line of cases dealing with Hobbs Act extortion as it pertains to non-elected officials. Accordingly, we do not read *Sun Diamond* to require a heightened *quid pro quo* jury instruction, distinct from that outlined in *Evans*, in this case. Because the District Court's jury instruction comports with that in *Evans* and *Bradley*, we reject Antico's allegation of error in this respect.

B. Intangible Rights of Honest Services

1. Sufficiency of the Government's Proof

The jury found that the Government had proven all of the mail and wire fraud racketeering acts under the RICO count and found Antico guilty of all of the substantive counts of mail and wire fraud. On appeal, Antico challenges the sufficiency of the evidence with respect to the fraudulent schemes. Again, sufficiency of the evidence is reviewed in a light most favorable to the Government following a jury verdict in its favor. *Glasser v. United States*, 315 U.S. 60, 80 (1942). "We must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision. . . . We do not weigh evidence or determine the credibility of witnesses in making this determination." *United States v. Beckett*, 208 F.3d

140, 151 (3d Cir. 2000) (citations omitted). The scope of review is over the totality of the evidence, both direct and circumstantial. *United States v. Czubinski*, 106 F.3d 1069, 1073 (1st Cir. 1997).

In relevant part, the mail and wire fraud statutes provide:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [uses the mails or wires, or causes their use] for the purpose of executing such scheme or artifice . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §§ 1341 & 1343. To prove mail or wire fraud, the evidence must establish beyond a reasonable doubt (1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme. *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984). Identical standards apply to the "scheme to defraud" under both the mail and the wire fraud statutes. *United States v. Boots*, 80 F.3d 580, 586 n.11 (1st Cir. 1996).

Courts have interpreted the term " 'scheme or artifice to defraud' [to] include a scheme or artifice to deprive another of the intangible right of honest services," *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998) (citing *United States*

v. Sawyer, 85 F.3d 713, 723-24 (1st Cir. 1996)), giving rise to the "intangible rights doctrine."[16] This doctrine reaches public and private fraud at the state and local levels, including prosecutions of public officials or employees who have failed

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16. The intangible rights doctrine gradually developed as courts of appeals interpreted the mail fraud statute since its origin in the late 1800s. In 1987, the Supreme Court overturned decades of mail and wire fraud jurisprudence in *McNally v. United States*, 483 U.S. 350 (1987), when it held that the mail and wire fraud statutes do not prohibit schemes to defraud individuals of their intangible right to honest government services. In response, Congress enacted the honest services amendment the next year. It provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (effective Nov. 11, 1988). Section 1346 was enacted without much comment and little legislative history. However, commentary and judicial reflection indicate that the statute was enacted to overturn *McNally* and restore the evolution of mail and wire fraud to its pre-*McNally* status. *See* 134 Cong. Rec. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) ("This amendment restores the mail fraud provision to where that provision was before the *McNally* decision."); *Id.* at S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) ("This section overturns the decision in *McNally v. United States*. . . . Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials."); *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (noting "Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services' "); *United States v. DeVegter*, 198 F.3d 1324, 1327 (11th Cir. 1999) (noting that " 'Congress passed [§ 1346] to overrule *McNally* and reinstate prior law' ") (alteration in original); *United States v. Grandmaison*, 77 F.3d 555, 556 (1st Cir. 1996) (same, citing cases).

to provide honest services to the citizenry they serve.[17] Although our interpretation of the scope of the mail and wire fraud statutes is not boundless, we have construed a "scheme or artifice to defraud" to encompass intangible rights. *Clapps*, 732 F.2d at 1149-53 (affirming the conviction of a county political party chairman who defrauded nursing home residents of their absentee ballots and marked them in favor of the party's candidate); *United States v. Frankel*, 721 F.2d 917, 920-21 (3d Cir. 1983) ("Schemes to defraud come within the scope of the statute even absent a false representation."); *United States v. Boffa*, 688 F.2d 919, 931 (3d Cir. 1982) (concluding that a scheme to defraud employees "of the loyal, faithful, and honest services of their union official alleges a crime within the scope of the mail fraud statute"). Given Congress' clear intent in enacting § 1346, we join with those courts that recognize that the scope of the amendment

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17. *See, e.g., Woodward*, 139 F.3d 46 (affirming the conviction for mail and wire fraud on the "theft of honest services" theory where legislator, serving on the Joint Committee on Insurance, accepted illegal gratuities from insurance industry lobbyist); *United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (applying the mail fraud statute to local political corruption and affirming the conviction of a Boston city official who secretly arranged for a friend to receive commissions from the city's choice of health insurance provider); *United States v. Margiotta*, 688 F.2d 108, 112-13 (2d Cir. 1982) (affirming the conviction of the chairman of a local Republican committee who fraudulently arranged for his associates to receive insurance contracts with local governments); *see* also Daniel W. Hurson, *Mail Fraud, The Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 Hous. L. Rev. 297, 305 & n. 34 (2001) (citing cases).

includes the prosecution of state and local officials and public employees for depriving the citizens they serve of their right to honest services.[18]

The Government's prosecutorial theory on this point is that Antico, by failing to disclose his personal interest in a matter over which he had discretionary decision-making authority, deprived the public of its right to disinterested decision-making and of its right to full disclosure of his potential motivation. The scheme to defraud involved Antico's setting Ricciardi up as an expediter, then preparing and approving her permits. Ricciardi received a fee for her "services" which, in turn, substituted for Antico's obligation to pay child support. The Government contends that the requisite intent to defraud was met, in light of this scheme, by Antico's failure to disclose the nature of his personal interest in Ricciardi's business and to recuse himself from reviewing approvals submitted by her. Finally, the Govern-

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18. Antico argues that extension of the mail fraud statute to local political corruption runs counter to the heightened federalism concerns recently raised by the Supreme Court. *See Cleveland*, 531 U.S. at 25 ("As we reiterated last Term, 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes."). However, Antico's argument is misplaced. While the Supreme Court recently voiced federalism concerns over the reach of mail fraud prosecutions in general in *Cleveland*, it acknowledged that Congress indeed spoke clearly when it restored the "intangible right of honest services" within the scope of § 1346. *Id.* at 20. Moreover, we need not reconcile the principles of federalism with § 1346 in this case because Antico owed a duty to the citizens of Philadelphia under state and local law. *See Margiotta*, 688 F.2d at 124.

ment contends, and Antico does not dispute on appeal, that interstate phone calls and mailings were made in furtherance of the scheme.

Antico argues that while "discharge of debt" of a family member may pose a conflict of interest, his "nepotistic gifting" to his girlfriend does not rise to an actionable deprivation of his honest services under the mail or wire fraud statutes. He denies that he had a financial interest in Ricciardi's business at the time alleged in the indictment because his debt, if any, had mathematically been discharged at the time of the indictment. With respect to his intent to defraud, Antico argues that he never actively concealed from his colleagues at L & I either that he had children with Ricciardi or that he set her up in the expediting business. Thus a requisite element of fraud is missing. We address each of these contentions in turn.

Honest services fraud typically occurs in two scenarios: (1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain. *Woodward*, 149 F.3d at 54-55. This duty to disclose a conflict of interest arises in the private sector from the fiduciary relationship between an employer and an employee. In the public sector, the duty is oftentimes prescribed by state and local ethics laws. In the latter context,

> [a] public official has an affirmative duty to disclose material information to the public employer. *See Silvano*, 812 F.2d at 759. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public

> is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act. *See id.* (upholding conviction of city fiduciary who failed to disclose material information about unnecessary spending of city money for secret enrichment of fiduciary's friend). Thus, undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services.

Sawyer, 85 F.3d at 724.

We agree with the Government that Antico's duty to disclose material information with respect to his conflict of interest with Ricciardi arose from state and local law. Antico disagrees, arguing that the state and local conflict of interest laws that governed his conduct while at L & I contained a loophole for "girlfriends." 65 Pa. C.S.A. § 402 (". . . for the private pecuniary benefit of himself, a member of his immediate family or *a business with which he or a member of his immediate family is associated*"); Philadelphia Code § 20-607 ("nor shall any financial interest be held by a parent, spouse, child, brother, sister or like relative-in-law, or *by any person*, firm, partnership, corporation, business association, trustee or *straw party for his or her benefit*") (emphases added). We read the emphasized portions of these statutes to include Antico's scheme with Ricciardi. The expediting scheme with Ricciardi, while certainly benefitting her (and at least indirectly the two children she had with Antico), also provided a tangible benefit to Antico: it fulfilled his ongoing

child support obligation and served as consideration in exchange for Ricciardi's forgoing court proceedings against him.[19] Therefore, Antico owed the City a duty to disclose this financial arrangement, the failure of which constitutes honest services fraud.

Antico correctly notes that "the broad scope of the mail fraud statute . . . does not encompass every instance of official misconduct that results in the official's personal gain." *Czubinski*, 106 F.3d at 1076 (citing *Sawyer*, 85 F.3d at 725) (reversing conviction of IRS employee on mail fraud charges for unauthorized browsing of taxpayer files absent a showing of impartial performance of public servant's duties); *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1987) ("We do agree that the words 'scheme or artifice to defraud' don't reach everything that might strike a court as unethical conduct or sharp dealing"). However, even if we were to read these conflict of interest provisions as restrictively as Antico suggests, we find that his conduct violated the fiduciary relationship between a public servant charged with

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19. Antico's mathematical contention that his child support obligation disappeared after Ricciardi had earned roughly $32,000 (based on the court-ordered payment in the 1980s) ignores the ongoing and dynamic nature of his obligation, as well as the fact that he also purchased Ricciardi's agreement not to pursue court sanctions against him as long as she cared for his children. Moreover, as we state later in this discussion, even if we were to disregard the child support arrangement, Antico's conduct in filling out the applications and then personally approving them for the financial benefit of Ricciardi deprives the public of the disinterested decision-making of one of its public servants, a breach of Antico's fiduciary duty to the citizens of Philadelphia.

disinterested decision-making and the public he serves. *Id.* at 307 ("Fraud in its elementary common law sense of deceit — and this is one of the meanings that fraud bears in the [mail fraud] statute . . . — includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public. . . ."). Duties to disclose material information affecting an official's impartial decision-making and to recuse himself exist within this fiduciary relationship regardless of a state or local law codifying a conflict of interest. *Id.* at 309; *Silvano*, 812 F.2d at 759-60. Antico's exercise of his discretionary authority in both filling out and approving the applications submitted by Ricciardi without disclosing his interest in the scheme goes beyond the mere ministerial function excused in *Czubinski* and into the realm of interested decision-making. When coupled with the duty imposed by state and local conflict of interest laws, Antico's failures to disclose his financial business arrangement with Ricciardi and to recuse himself from taking action with respect to her applications fall within the scope of honest services fraud.

Antico also contends that "absent deceit, concealment, demonstrable public harm or other active fraud," his conviction for wire fraud cannot stand. We disagree. In the context of honest services fraud, where "undisclosed, biased decision-making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services," *Sawyer*, 85 F.3d at 724, an active fraud or deceit is not necessary.

> [T]he courts that have accepted the notion that a deprivation of intangible rights is within the statute[ ] recognize that an active misrepresentation

> is not necessary. Instead, the prosecution need prove only a recognizable scheme formed with intent to defraud regardless of how that intent manifests itself in execution. For example, a public official engaged in bribery by mail need not actively make any misrepresentations in order to violate section 1341.

Frankel, 721 F.2d at 920-21. "The legal meaning of 'fraud' is not limited to deceit or misrepresentation; it includes overreaching, undue influence, and other forms of misconduct." *Holzer*, 816 F.2d at 309. Nor is a showing of public harm required. *Sawyer*, 85 F.3d at 724 (". . . whether or not tangible loss to the public is shown"); *Holzer*, 816 F.2d at 308 ("It is irrelevant that . . . [Holzer's] conduct caused no demonstrable loss either to a litigant or to the public at large."); *Silvano*, 812 F.2d at 760 ("It is immaterial whether [the defendant] personally profited from the scheme or whether the City suffered a financial loss from it.") (citing *United States v. Lemm*, 680 F.2d 1193, 1205 (8th Cir. 1982)); *United States v. Mandel*, 591 F.2d 1347, 1358 (4th Cir. 1979) (approving the prosecution of allegedly corrupt politicians who did not deprive the citizens of anything of economic value); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975) (same).

In this case, Antico's failure to disclose his financial interest in the success of Ricciardi's expediting business and his failure to recuse himself from approving the permit applications he filled out constitute "deceit" for purposes of the mail fraud statute. "[A]n official's intentional violation of the duty to disclose provides the requisite 'deceit'." *Sawyer*, 85 F.3d at 732 (citing *Silvano*, 812 F.2d at 760).

Appendix A

The fact that Antico did not conceal his relationship with Ricciardi from his co-workers does not vindicate his failure to disclose to his supervisors the conflict arising from their financial arrangement nor his failure to recuse himself from acting on the permit applications she submitted.

It also does not preclude a jury from finding Antico possessed the requisite intent to defraud the citizens of Philadelphia. *Woodward*, 149 F.3d at 62 ("Woodward's intent is . . . demonstrated by his failure to disclose his conflict of interest although he was required to do so."). The fact that Antico never reported any conflict of interest to his superiors while at L & I, despite his knowledge of the state and local conflict of interest laws, supports the jury's finding of intent to deceive necessary for a wire fraud conviction. In fact, Antico continued the fraudulent scheme even after L & I Commissioner Levin specifically instructed him in 1993 to have no involvement in approving Ricciardi's permit applications. Despite Levin's instructions, Antico urged Ricciardi to submit permits on behalf of the Philadelphia Sign Company, which he approved. Antico also prepared the permit application for Wizzards at this time on Ricciardi's behalf and prepared the appeal before the ZBA, signing Ricciardi's name. Finally, Antico told the owner of the Beach Club to use Ricciardi as his expediter, affirmatively promoting this scheme despite the warning of the conflict of interest.

In sum, when we view this evidence in the light most favorable to the Government, we find that it has met its burden of proof. There was clearly sufficient legal support and factual evidence, both direct and circumstantial, on which a reasonable jury could rely to reach its verdicts.

2. Materiality Instruction

According to Antico, the District Court erred by omitting "materiality" from its jury instruction on the mail fraud racketeering acts. He relies on the Supreme Court's declaration in *Neder v. United States*, 527 U.S. 1 (1999), that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Id.* at 25. This Court considers the totality of the jury instructions to determine "whether, viewed in light of the evidence, the charge as a whole fairly and adequately submits the issues in the case to the jury." *United States v. Thayer*, 201 F.3d 214, 221 (3d Cir. 1999). Because Antico did not object to the District Court's treatment of materiality, we only review it for plain error. *Johnson v. United States*, 520 U.S. 461, 465-67 (1997). Under Rule 52(b) of the Federal Rules of Criminal Procedure, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim P. 52(b). The Supreme Court in *United States v. Olano*, 507 U.S. 725 (1993), articulated the limitations on appellate review under Rule 52(b): "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error.' " *Id.* at 732. The second is that the error be "plain" and the third is that the error "affect substantial rights." *Id.* at 734. Even if these requirements are met, the court should not exercise its discretion unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736.

In light of the Supreme Court's holding in *Neder*, Antico argues that he is entitled to a new trial because, after the District Court instructed the jury on materiality with respect to the wire fraud counts and racketeering acts

(Counts Eleven through Eighteen), it did not re-instruct the jury on materiality with respect to the mail fraud racketeering acts (Racketeering Acts 14A-D). In addition, Antico submits that the District Court should have specifically instructed the jury that materiality must be proven beyond a reasonable doubt. The question is whether this failure to re-instruct the jury on materiality when giving the mail fraud instruction constitutes plain error.

The District Court's instructions were carefully crafted and lengthy, spanning over 100 pages. With respect to the wire fraud counts, the Court began by defining a scheme to defraud in the context of wire fraud. It explained that the Government must prove beyond a reasonable doubt that there was a "scheme or artifice to defraud," and defined a scheme to defraud as "any plan, device or course of action to obtain money or property or the intangible right of honest services by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence." In describing "false and fraudulent representations," the District Court stated: "The false or fraudulent representation or failure to disclose[ ] must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." Clearly the wire fraud instruction was adequate.[20] However,

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20. Antico takes issue with the wire fraud jury charge to say that "materiality" should have been instructed "beyond a reasonable doubt" in the same sentence. Because the District Court defined materiality as an element of the scheme to defraud, and explained that the scheme needed to be proven beyond a reasonable doubt, we

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when discussing the racketeering acts of mail fraud under the RICO count, the Court did not instruct on false representations and materiality.

Preliminarily, we find Antico's case to be unlike *United States v. Gaudin*, 515 U.S. 506 (1995), where the Court entirely failed to present the issue of materiality to the jury. In this case, both the wire fraud and the mail fraud offenses derived from the same scheme between Antico and Ricciardi. The material information that was not disclosed by Antico was the same in both counts. Therefore, a reasonable jury, instructed to consider materiality with respect to this scheme, would logically do so in the context of both wire fraud and mail fraud. *See United States v. Winstead*, 74 F.3d 1313, 1319 (D.C. Cir. 1996) (concluding that where only one fraudulent scheme was at issue with respect to both mail fraud and false statement charges, the court's instruction to the jury that materiality was an element of the mail fraud charge ensured that the jury would have found this element existed with respect to the false statement charge had the jury been properly instructed).

The District Court's instructions clearly informed the jury that, by definition, "a false or fraudulent representation or failure to disclose [ ] must relate to a material fact or matter." By convicting Antico of wire fraud, the jury found that Antico's failure to disclose was material, and "it is beyond

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(Cont'd)
conclude that the jury charge was sufficient in this respect. He also questions whether materiality should be subject to a "reasonable person" test in the circumstances. *Neder* instructs us that the reasonable person test is not error. 527 U.S. at 22.

doubt that the members of the jury would have reached the same conclusion had they explicitly considered materiality as part of their deliberations" on the mail fraud racketeering acts stemming from the same conduct. *Winstead*, 74 F.3d at 1321. Therefore, the District Court's jury instructions on materiality were not erroneous.

C. Scheme to Defraud Philadelphia of Property/McCausland's Zoning Permits

In light of the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000), the Government agrees that Counts Seventeen and Eighteen should be remanded to the District Court for entry of judgments of acquittal. In *Cleveland*, the Court reversed a mail fraud conviction of a defendant who obtained a video poker license from the state by making false representations on his license application. The Court held that an unissued video poker license was not property within the meaning of the mail fraud statute. *Id.* at 15.

Counts Seventeen and Eighteen charged that

> while Antico was working as a private expediter following his retirement from L & I, he obtained a zoning and/or use registration permit for Maureen McCausland's putative prostitution business. He obtained that permit by falsely stating on the permit application that McCausland was going to operate a "modeling studio/physical fitness business" in Philadelphia.

The prosecution of Antico on these two counts was premised on a zoning permit being property within the meaning of § 1343. Appellee's Supp. Br. at 2. Because the Supreme Court's ruling negates the Government's premise, we reverse Antico's conviction on these counts.

D. Sentencing Challenges

Antico alleges that the District Court erred by (1) enhancing his offense level by four levels because it determined he was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, and (2) inflating the loss attributable to the Ricciardi scheme to defraud to over $700,000, the amount earned by Ricciardi in her expediting business. We review for clear error a District Court's factual determinations underlying the application of the Sentencing Guidelines. *United States v. Helbling*, 209 F.3d 226, 242-43 (3d Cir. 2000) (citing *United States v. Ortiz*, 878 F.2d 125, 126-27 (3d Cir. 1989)). Our review of the District Court's legal interpretation of the Sentencing Guidelines is plenary. *United States v. Yeaman*, 194 F.3d 442, 456 (3d Cir. 1999). Once these tests are satisfied, we owe deference to the District Court's application of the Sentencing Guidelines to those facts, as required by 18 U.S.C. § 3742(e). *Helbling*, 209 F.3d at 243.

The District Court grouped Antico's convictions for purpose of sentencing, placing the extortion activity in one group, U.S. Sentencing Guidelines Manual § 2(c)(1.1) (1999), and the mail and wire fraud activity in a second group, U.S. Sentencing Guidelines Manual § 2(c)(1.7). It then calculated the offense levels for each group. The extortion

group led to an offense level of twenty-four and a sentence of sixty-three months, while the fraud group led to an offense level of twenty and a sentence of sixty months (to run concurrently). The District Court used the adjusted offense level of the highest group, extortion, to determine the sentencing range. Therefore, the ultimate sentence imposed by the District Court, sixty-three months, was not based on the amount of loss caused by the fraud activities. Antico's objection to his leading role adjustment pertains to the first group of extortion activities whereas his objection to the loss calculation pertains to the second group of fraud activities. The Government contends that the District Court's use of the extortion group to determine Antico's ultimate sentence renders Antico's objection to the loss calculation moot.

1. Organizer or Leader of a Criminal Activity of Five or More Participants or Otherwise Extensive Criminal Activity

We review for clear error the District Court's factual determinations that Antico was an organizer or leader and that his criminal activity involved five or more participants. *Helbling*, 209 F.3d at 242-43. In simple terms, we will vacate "only if we are left with a definite and firm conviction that a mistake has been made." *United States v. Dent*, 149 F.3d 180, 189 (3d Cir. 1998). With respect to the extortion offenses, the District Court adjusted Antico's base offense level upward four levels for his aggravating role. Under § 3B1.1 of the Sentencing Guidelines, a District Court adjusts the offense level based on defendant's role as follows:

Appendix A

§ 3B1.1. AGGRAVATING ROLE

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

U.S. Sentencing Guidelines Manual § 3B1.1. "Participant" is defined as one "who is criminally responsible for the commission of the offense, but need not have been convicted." U.S. Sentencing Guidelines Manual § 3B1.1, cmt. n.1. Application note 3 adds gloss to what the District Court should consider when determining the defendant's role:

> In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

U.S. Sentencing Guidelines Manual § 3B1.1, cmt. n.3.

We agree with the District Court's conclusion that Antico was an organizer or leader of criminal activity. Application note 3 to § 3B1.1 identifies relevant factors in this determination:

> Factors the court should consider include the exercise of decision making authority, the nature

> of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. With respect to Meehan and Antico, Jr., the evidence supports the conclusion that he played a decision-making role in their activities with respect to extorting Wizzards and Pin Ups. Antico also supervised the Business Regulatory Unit at L & I, the unit charged with enforcing the adult cabaret ordinances. When Wizzards, Pin Ups and Teazers were shut down, Antico made the decisions and issued the orders. The District Court's findings in this regard are not clearly erroneous.

Under the "five or more participants" prong of § 3B1.1, the District Court counted the defendant and the unindicted co-conspirators of Antico, Jr. and Meehan because of their involvement in the scheme to extort Wizzards and Pin Ups of a financial interest in the businesses. The District Court also counted Maureen McCausland and Barbara Williams because of their extortion payments to Antico to benefit their prostitution business and expediting business, respectively. The District Court also considered "at least some of the other victims and all of the unknowing persons at the Department of Licenses and Inspections . . . in determining whether there were five or more participants." Alternatively, under the "otherwise extensive" prong of § 3B1.1, the District Court ruled that "there were the functional equivalent of five

participants by reason of the use of . . . L and I personnel" (citing to *Helbling*, 209 F.3d at 248 ("[T]he court must determine the extent to which the services of each individual, non-participant, were peculiar and necessary to the criminal scheme . . . [and] then consider whether the sum of the participants and countable non-participants is the 'functional equivalent' of five participants.")).[21]

We take issue with the District Court's inclusion of Maureen McCausland and Barbara Williams, victims of Antico's extortion schemes, in the mix of five participants. Extortion victims, whether they operate legitimate or illegitimate businesses, are still victims. As this case demonstrates, owners of illegitimate businesses such as Maureen McCausland may be particularly vulnerable to an L & I official's abuse of power, but they are no more criminally responsible for the offense of extortion than legitimate business owners. The same holds true for expediters. The fact that their legitimate role in filling out and hastening permit applications to L & I was corrupted by Antico does not make them criminally responsible for being extorted by him. In this respect, the District Court's inclusion of both Maureen McCausland and Barbara Williams within the definition of participant is clearly erroneous. By its definition, only Antico, Meehan, and Antico, Jr. may be counted.

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21. The District Court apparently imported the "functional equivalency" test from the "otherwise extensive" prong into the "five or more participants" determination by counting all of the unknowing persons at L & I. We note that the "five or more participants," by definition, must somehow be responsible criminally for the offense. Therefore, the unknowing L & I officials are more appropriately considered in the "otherwise extensive" determination.

Alternatively, the District Court ruled that Antico's criminal activity met the "otherwise extensive" prong of § 3B1.1, justifying a four level increase. With respect to what constitutes "otherwise extensive," we caution that "not every individual tangentially involved in the criminal activity can fairly be considered in the analysis. The purpose of the provision would rarely be achieved by counting the unknowing services of some actors in a criminal scenario, a taxicab driver or bank teller, for instance." *Helbling*, 209 F.3d at 247 (citation omitted). To guard against such a broad brush, we adopted in *Helbling* the three-step test from *United States v. Carrozzella*, 105 F.3d 796 (2d. Cir. 1997), to help determine whether the criminal activity is "otherwise extensive."

> A sentencing court must first separate out the "participants" as defined by Application Note 1 from other individuals, non-participants, who were involved in the criminal activity. . . . The defendant may be considered as one of the participants. The court must next determine whether the defendant used each non-participants' services with specific criminal intent. Third, the court must determine the extent to which the services of each individual, non-participant, were peculiar and necessary to the criminal scheme.

Helbling, 209 F.3d at 247-48 (citations omitted).

We add to this rule another consideration. The language of § 3B1.1 requires the court to consider the defendant's leadership role *with respect to the particular offense charged.*

Appendix A

Although "all persons involved during the course of the entire offense are to be considered," this does not sanction a court taking the activities of non-participants from unrelated schemes and grouping them together to reach the "functional equivalent" of five persons. The actions or services of non-participants must all relate to the common criminal activity or scheme — and to the offense charged. A sentencing court should take particular care in situations where like offenses have been grouped together for sentencing purposes, as was done in this case. Counting Maureen McCausland and Barbara Williams among the "functional equivalent" of five participants was clearly erroneous for this reason as well.

In light of our ruling that victims may not be considered as participants, it is unclear from the record whether the District Court properly completed the "otherwise extensive" analysis. Assuming that Antico, Meehan, and Antico, Jr., were participants, the District Court next needed to determine whether Antico used each non-participant L & I officials' services with specific criminal intent and as part of a single criminal scheme. The District Court did not make explicit findings in this regard. Citing step three from *Helbling*, the District Court found that the services of those L & I officials mentioned in the Government's submissions — Thomas Simmonds, Gary Adams, Steve Gibbs, Michael Shaughnessy, Dominic Verde, and Gerald Richards — who were used by Antico to shut down Wizzards and Pin Ups, met the "peculiar and necessary" test. However, based on the record before us, we cannot say that the District Court undertook the proper legal and factual analysis when it made its "functional equivalency" determination. We therefore vacate the sentence on the extortion charges and remand for re-sentencing in accordance with *Helbling* and this opinion.

2. Loss Calculation

Antico also challenges the District Court's loss calculation on the mail and wire fraud offenses. In sentencing Antico on this group of offenses, the District Court employed § 2(c)(1.7)(b)(1)(A) of the Sentencing Guidelines, which reads:

> (b) Specific Offense Characteristic
>
> (1) (If more than one applies, use the greater):
>
> (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

The Commentary to § 2F1.1 defines loss as "the value of the money, property, or services unlawfully taken." U.S. Sentencing Guidelines Manual § 2F1.1, cmt. n.7. The loss calculation need not be precise; the Sentencing Guidelines require only a "reasonable estimate" based on the information available. *Id.* at n.8. Generally, a defendant's gain may provide a reasonable approximation of a victim's loss and may be used when more precise means of measuring loss are unavailable in determining the sentence dealing with offenses involving fraud or deceit. *Id.*; *see United States v. Andersen*, 45 F.3d 217 (7th Cir. 1995).

The District Court used the amount of $770,284 to adjust the offense level from ten to twenty in accordance with the table in § 2F1.1. The question presented on appeal is whether the District Court's loss calculation, based on the entire gain to another "acting with the public official" in honest services fraud, is clearly erroneous. The victim in this case, the citizenry of Philadelphia, lost something intangible: the honest services of one of its public officers. How should this loss be valued? Antico objects to calculating the loss from the gross receipts to Ricciardi in her expediting business. Instead, he argues that the loss should be at most the estimated $31,200 child support obligation that was the motivation behind his scheme to defraud, or arguably zero in light of our decisions in *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996), and *United States v. Hayes*, 242 F.3d 114 (3d Cir. 2001), that actual loss or actual harm, as opposed to defendant's gain, was the appropriate basis for measuring the loss.

In *Maurello*, this Court considered "whether money paid by clients for apparently satisfactory legal services performed by an unlicensed attorney is considered part of the 'loss' from the attorney's fraudulent acts for purposes of § 2F1.1." 76 F.3d at 1308. "To the extent that the unauthorized services provided by defendant have not harmed their recipients, but to the contrary have benefitted them, we conclude that defendant's base offense level should not be enhanced." *Id.* at 1312. While not an exact fit, *Maurello* seems to reject the notion that what Ricciardi's clients paid her for her services, with which they were satisfied, is the appropriate measure of loss.

Antico also cites to *United States v. Hayes*, wherein we approved the *Maurello* approach to loss calculation. The issue in *Hayes* was "whether the total salary paid to Hayes in all of her fraudulently obtained employment should have been assessed as the amount of loss . . . or whether, under the rule of *Maurello* [citation omitted], the court should have attempted to determine whether any of the services performed by defendant had value." *Hayes*, 242 F.3d at 115. We held that *Maurello* controlled and vacated and remanded for resentencing "[b]ecause, had the District Court applied *Maurello*, it might have fixed a lower offense level resulting in a lesser sentence than the year and a day sentence imposed." *Id.*

Antico argues that the District Court should have applied the *Maurello/Hayes* logic in this case. Inasmuch as none of Ricciardi's clients were harmed, he insists the loss should be zero and no enhancement be applied. We reject Antico's reliance on *Maurello* and *Hayes*, which did not decide the issue of loss from honest services fraud, in favor of the clear outcome mandated by the Sentencing Guidelines in this case. "If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit)." U.S. Sentencing Guidelines Manual § 2(c)(1.7)(b)(1)(A). The amount Ricciardi received — by "acting with the public official" — is the correct

measure of loss under this section. Therefore, the District Court's calculation of the loss at $770,284 was not clearly erroneous.[22]

In summary, we vacate the sentence imposed by the District Court in this case and remand for three reasons. First, the District Court needs to determine whether our reversal of conviction on Counts Seventeen and Eighteen has any effect on its decision to sentence within the sentencing range on the fraud grouping of offenses. Second, we vacate and remand for the District Court to conduct the necessary inquiry with respect to Antico's aggravating role in the extortion scheme, as set forth in *United States v. Helbling*, 209 F.3d 226 (3d Cir. 2000), and this opinion. Finally, the District Court must reconsider its decision to sentence Antico based on the extortion grouping of offenses after recalculating the sentence for each of the wire fraud group and the extortion group in accordance with this opinion.

* * * * *

22. The Government contends that we need not reach the question because the ultimate sentence was based on the higher offense level generated by the extortion grouping, and did not rest on the lesser offense level under the fraud grouping. Thus, even if the District Court calculated the loss as something less, the ultimate sentence of 63 months would have been imposed anyway based on the higher extortion sentence. We have addressed the fraud loss calculation because our remand to the District Court for reconsideration of Antico's sentence in light of our reversal on Counts 17 and 18 (wire fraud) and our ruling on Antico's aggravating role in the extortion scheme may affect the grouping chosen by the District Court in its ultimate sentence.

Accordingly, we affirm Antico's convictions on Count One (RICO),[23] Counts Two through Ten (extortion), and Counts Eleven through Sixteen (wire fraud). We reverse the conviction on Counts Seventeen and Eighteen (wire fraud). Finally, we vacate Antico's sentence and remand to the District Court for resentencing in accordance with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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23. Antico's conviction on the RICO Count is unaffected by our reversal of Counts 17 and 18 because the McCausland wire fraud scheme was not charged as predicate racketeering acts.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1446

UNITED STATES OF AMERICA,

v.

FRANK ANTICO,

Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 98-242-01)
District Judge: Honorable Jan E. DuBois

Argued: April 5, 2001
Before: SCIRICA, AMBRO AND GIBSON*
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on April 5, 2001. On consideration whereof, it is now ORDERED AND ADJUDGED by this Court that the judgment of the District

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

Court entered on April 28, 2000 be and the same is hereby AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

All of the above in accordance with the opinion of the Court.

ATTEST:

s/ Marcia M. Williams
Clerk

DATED: November 28, 2001

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 12, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-1446

UNITED STATES

v.

FRANK ANTICO,

Appellant

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and GIBSON,* *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

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* As to panel rehearing only.

Appendix B

BY THE COURT:

s/ [illegible]
Circuit Judge

DATED: JAN 17 2002